Supreme Court, U.S.
FILED
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NO. 031612

IN THE

SUPREME COURT OF THE UNITED STATES

REMIGIO I. AGUSTIN -- PETITIONER

vs.

UNITED STATES -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a *final*, Federal Rules of Civil Procedure (FRCP) Rule 41(b) (or "Rule 41(b)")-"lack of jurisdiction"-ruling by a district court over a claim precludes the application of 28 USC Section 1500 over the same claim in the U.S. Court of Federal Claims (or "Claims Court")?

(2) Whether, based on the U.S. District Court for Northern California's (or "District Court") 5-23-01 and 6-8-01, final, Rule 41(b)-"lack of jurisdiction" rulings that Agustin has "never alleged" (App. E-71) or "never asserted" (footnote 2, at App. E-27) "the same [Back Pay Act claim or Takings] claim" (Keene v. United States, 508 U.S. 200, 216 (1993) (or "Keene") based on violation of "5 USC Section 6307 and/or FECA [or Federal Employees' Compensation Act]" (App. E-30) or "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13) before the District Court, the U.S. Court of Appeals for the Federal Circuit's 3-3-04, opinion affirming the Claims Court's 9-5-03, 28 USC Section 1500-lack of jurisdiction ruling over the same Back Pay Act and Takings claims, ***produces absurd and unconscionable unconstitutional result or condition***, is ***unconstitutional***, and is in violation of, or contrary to, our U.S. Constitution's First Amendment ***guarantee*** of the right "to petition" our federal courts "for a redress of grievances", and our Fifth Amendment "due process" ***guarantee*** of the rights to be heard, and to have a fair and full hearing, on the merits of (a) his claim that Rule 41(b) precludes the application of 28 USC Section 1500 in the Claims Court, and (b) his timely filed and judicially cognizable Back Pay Act and Takings claims in the Claims Court, and deprives Agustin's fundamental and substantive, ***guaranteed*** First and Fifth Amendment constitutional rights pursuant to the said constitutional provisions?

(3) Whether, based on the District Court's final, Rule 41(b)-"lack of jurisdiction" rulings that Agustin has "never alleged" (App. E-71) or "never asserted" (footnote 2, at App. E-27) "the same [Back Pay Act claim or Takings] claim" (Keene, 508 U.S., at 216) based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) or "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13) before the District Court, the U.S. Court of Appeals for the Federal Circuit's 3-3-04, opinion affirming the Claims Court's 9-5-03, 28 USC Section 1500-lack of jurisdiction ruling over the same Back Pay Act and Takings claims is flawed as a matter of law because such ruling is quite "'contrary to'" the following U.S. Supreme Court's "clearly established law" or "governing law" (Mitchell v. Esparza, 540 U.S. ___ (2003), 124 S. Ct. 7, 10 (2004): (a) its governing Rule 41(b)-case law in Costelo v. United States, 365 U.S. 265, 286 (1961), (or "Costelo") and in Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek'); (b) its governing Rules Enabling Act-case law; (c) its Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999); and (d) our U.S. Constitution's Full Faith and Credit provision (Article IV, Section 1) and/or our federal ***res judicata*** (issue preclusion) rules or case law?

(4) Whether, with respect to Agustin's underlying Back Pay Act and Takings claims in the Claims Court, based on the interest of ***equal justice for all*** and this Court's power of supervision, this Court should address, take action, and put an immediate stop to all our federal courts' continuing ***unconstitutional injustice***—all our federal courts' continuing ***unconstitutional*** **deprivation** of our civil servants' First Amendment right "to petition" our federal courts "for a redress of grievances" and their Fifth

Amendment "due process" right to be heard, and to a fair and full hearing, on the merits of their Back Pay Act claims in personnel/pay action cases which involve a violation of our money-mandating federal statutes or federal regulations or "wrongful deprivation of pay" (United States v. Testan, 424 U.S. 392, 406 (1976)), through our federal courts' continuing application of an "'either-or proposition'"-per se rule (J.E.M. Ag Supply, Inc. v. Pioneer Hi-bred International, Inc., 122 S. Ct. 593, 605 (2001)) between the Civil Service Reform Act (or "CSRA") and the Back Pay Act with respect to statutory coverage, or with respect to competent jurisdiction over such claims between the Merit Systems Protection Board ("MSPB" or "Board") and the U.S. Court of Federal Claims (or "Claims Court")?

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PETITION FOR A WRIT OF CERTIORARI

At the outset, Agustin, who has outstandingly and unblemishly served this great nation with dedication, loyalty, and honor for more than 26 years in times of war and peace as a (volunteer, not drafted) honorably discharged Vietnam, U.S. veteran and as a U.S. Navy, civilian, full time, competitive service, career, federal employee (see App. D-1 to 2, and App. EE-37), cries and begs on his knees, ***in his quite long and quite nightmarish quest and search for justice***[1], that this honorable Court should grant his petition for a writ of certiorari because the instant case involves issues of momentous, national, and exceptional importance and significance to: (1) **all** litigants and to **all** cases in which the interpretation and application of both the Federal Rules of Civil Procedure (or "FRCP") Rule 41(b)'s "lack of jurisdiction" exception provision (or "Rule 41(b)") and 28 USC Section 1500's "shall not have jurisdiction " provision are inconsistent and are in irreconcilable conflict; (2) and to **all** our civil servants—**all** our federal and postal employees who have been, and still are, suffering ongoing ***unconstitutional injustice*** by all our federal courts.

FIRST, in mystifying, unfair, ***unconstitutional***, one-sided, tunnel-vision, Due Process-violative, and ***no-justice*** opinions, both courts (the U.S. Court of Appeals for the Federal Circuit (or "Appeals Court" or "Federal Circuit") and the U.S. Court of Federal Claims (or "Claims Court") refused or failed to consider, discuss, or even mention the Due Process-controlling effect and the *res judicata* (issue of jurisdiction-preclusion) effect of the U.S. District Court for the Northern District of California's (or "District Court") "**absolutely final**" (App. SC5-5), 5-23-01 and 6-8-01, Rule

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[1] See App. SC1-1 to 5, App. SC2-1, App. D-13 to 16, and SC7-1 to 2 concerning Agustin's quest and ***search for justice*** in both cases.

41(b)-"lack of jurisdiction" rulings[2] that Agustin has "never alleged" (App. E-71) or "never asserted" (footnote 2, at App. E-27) "the same [Back Pay Act or Takings] claim" ((Keene v. United States, 508 U.S. 200, 216 (1993), (or "Keene")) based on violation of "5 USC Section 6307 and/or FECA"[3] (App. E-30) or "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13) before the District Court. Based on the District Court's final, Rule 41(b)-"lack of jurisdiction" rulings, the Claims Court and the Federal Circuit refused or failed to consider that Agustin has "never alleged" (App. E-71) "the same claim" (Keene, at 216) "[p]ursuant to the Back Pay Act" (App. A-3) before the District Court. See App. CC-7 to 8 and App. BB-15.

Over abundance of caution, knowing that *this is Agustin's last and only chance in his search for justice*, pursuant to our U.S. Constitution, Agustin is hereby invoking his ***guaranteed*** First Amendment right "to petition" our federal courts "for a redress of grievances", and his ***guaranteed*** Fifth Amendment "due process" rights to be heard, and to a fair and full hearing, with respect to the interpretation and application of both Rule 41(b) and 28 USC Section 1500 over Agustin's Back Pay Act and Takings claims in the Claims Court, constitutional rights which Agustin has duly presented before the Claims Court and the Appeals Court—constitutional rights which both courts have ***unconstitutionally deprived*** from Agustin by their refusal or failure to consider or discuss: the Due Process-controlling effect of the District Court's final, Rule 41(b)-"lack of jurisdiction" rulings over the same Back Pay Act and Takings claims, Rule 41(b), the Rules Enabling Act (28 U. S. C. §2072(b)), this Court's Rule 41(b) and Rules Enabling Act-case laws, its Tucker Act-Claims Court's

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[2] See footnote 2 at App. E-27, App. E-30, and App. E-71.

[3] "FECA" means Federal Employees' Compensation Act.

scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), and its federal *res judicata* rules or case law, which are quite controlling over Agustin's Back Pay Act and Takings claims in the Claims Court. See App. CC-11 to 14.

In **all** cases which involve a final, district court's Rule 41(b)-"lack of jurisdiction" ruling over *a claim*, such as in the instant case, there is no danger or possibility of "duplicative litigation" of *the same claim* in the Claims Court. Keene, at 220, (Justice Stevens dissenting). In all such cases, this Court should never allow ***unconstitutional result or condition***—the ***unconstitutional deprivation*** of a litigant's First and Fifth Amendment rights, as what had happened to Agustin. Our courts cannot "shut their eyes to the Constitution or to deny a full and fair hearing when performing their [judicial or appellate] functions". Estep v. U.S., 327 U.S. 114, 127 (1946) (Justice Murphy, concurring). Here, there was no "judicial review" (id., at 120)—no consideration, discussion, nor even mention—of the District Court's Rule 41(b)-"lack of jurisdiction" rulings, which Agustin has duly presented before both courts.

SECOND, the merits of Agustin's underlying Back Pay Act and Takings claims also have momentous, exceptional, and national importance and significance, which has an ongoing, ***no-justice*** effect on the constitutionally protected property, rights, or interests of **all** our poor federal and U.S. Post Office employees (or "postal employees"), and which this honorable Court has a moral, humanitarian, and judicial duty to address.

For much too long, our federal courts': (1) continuing "misinterpretation of" (Hambsch v. U.S., 490 U.S. 1054, 1058 (1989) (or "Hambsch")), or refusal or failure to apply and enforce, our U.S. Supreme Court's Back Pay Act-case

law or decision in United States v. Testan, 424 U.S. 392, 405-406 (1976) (or "Testan") and its well established "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974) (or "Mancari"), Connecticut Nat. Bank v. Germain, 503 U. S. 249, 253 (1992) (or "Germain")[4], and J.E.M. Ag Supply, Inc. v. Pioneer Hi-bred International, Inc., 122 S. Ct. 593, 605 (2001) (or "J.E.M."); (2) our federal courts' continuing, impermissibly narrow interpretation and misapplication of United States v. Fausto, 484 U.S. 439 (1987) (or "Fausto") in claims involving personnel/pay action which is in violation of our money-mandating federal statutes or federal regulations, by applying "'an either-or proposition'"-per se rule (J.E.M., 122 S. Ct., at 605) between the Civil Service Reform Act (or "CSRA") and the Back Pay Act with respect to statutory coverage, or with respect to competent jurisdiction over such claims between the Merit Systems Protection Board ("MSPB" or "Board") and the Claims Court; and/or (3) our federal courts' blind search for waiver/s of sovereign immunity: produce continuing ***unconstitutional result or condition***—continuing ***unconstitutional injustice***—the continuing ***unconstitutional deprivation*** of our civil servants' First Amendment right "to petition" our federal courts "for a redress of [their] grievances" and their Fifth Amendment "due process" rights to be heard, and to a fair and full hearing, on the merits of their Back Pay Act claims, and "do[] continuing damage" (Hambsch, 490 U.S., at 1058) and travesty or miscarriage of justice against all our poor federal and postal employees. Such ***unconstitutional injustice*** against all our poor civil servants should be stopped by this honorable Court. See App. CC-14 to 18.

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[4] See Connecticut Nat. Bank v. Germain, 503 U. S. 249, 253 (1992) (statutes that overlap "do not pose an either-or proposition" where each confers jurisdiction over cases that the other does not reach).

With all due and utmost respect, due to the above reasons, all our federal courts, including this honorable Court, pay a lot of attention to the protection of our private sector employees' rights but pay very little, no attention, or ***no-justice at all*** to our poor civil servants' property, rights, or interests under our money-mandating statutes or regulations. Compare, for example, Hambsch v. U.S., 490 U.S. 1054 (1989) versus Ragsdale v. Wolverine, 122 S. Ct. 1155 (2002); and the ***unconstitutional deprivation*** of our civil servants' First and Fifth Amendment rights in Mann v. Haigh, 120 F.3d 34 (4th Cir. 1997), Russell v. U.S. Army, 191 F.3d 1016 (9th Cir. 1999), and in the instant case.[5] Such "continuing" travesty or miscarriage of justice affects "large class of cases" (Hambsch, at 1058) which involve federal and postal employers' violations of our money-mandating

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[5] Our federal court's blind search for waiver/s of sovereign immunity and/or its continuing misapplication of a "'an either-or proposition'"-per se rule (J.E.M., 122 S. Ct., at 605) between the Civil Service Reform act (CSRA) and the Back Pay Act, such as in Hambsch v. United States, 857 F.2d 763 (1988), Mann v. Haigh, 120 F.3d 34 (1997), Russell v. U.S. Army, 191 F.3d 1016 (9th Cir. 1999), and in the instant case, which are in violation of, or contrary to, our U.S. Supreme Court's governing, Back Pay Act-case law in Testan, 424 U.S. 392, 405-6 (1976) and its well established "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974), has resulted in ongoing ***unconstitutional*** result or condition— the ongoing ***unconstitutional*** deprivation of our civil servants' First Amendment right "to petition" our federal courts "for redress of [their] grievances" and their Fifth Amendment "due process" rights to be heard, and to a fair and full hearing, on the merits of their claims when federal or postal employers violate our money-mandating statutes or regulations. In Russell, the Ninth Circuit, (agreeing with Mann), in a First and Fifth Amendments-violative opinion, quite erroneously concluded that federal employees' claims under Title II of the Family and Medical Leave Act (FMLA) are barred by sovereign immunity and preempted by the CSRA. In all such cases, the MSPB would correctly rule that it lack jurisdiction, and our federal courts, with ***no justice***, would deny the same claims based on sovereign immunity and/or such a per se rule, thus depriving our civil servants' First and Fifth Amendment rights on an ongoing basis.

federal statutes and federal regulations through a personnel/pay action, such employers' violations or deprivations of our civil servants' constitutionally protected property, rights, or interests, or such employers' "wrongful deprivation of pay" (Testan, at 406) against our civil servants, such as what had happened in Agustin's case.[6] See App. BB-8.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the Federal Circuit (3-3-04 per curiam opinion) appears at Appendix (or "App.") A-1 to A-7, and is unpublished. The opinion of the U. S. Court of Federal Claims (9-5-03 Order) appears at App. B-1 to B-8, and is unpublished. The Claims Court's 9-8-01 Judgment is at App. B-9. On 9-30-03, the Claims Court filed Agustin's Notice of Appeal to the Federal Circuit.

JURISDICTION

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[6] With respect to Agustin's Back Pay Act claim, (that the Navy, through its 4-12-95 personnel/pay action, with deliberate indifference to his substantive and fundamental constitutional right to medical care or treatment (see items (d) to (f) at App. BB-3), inhumanely threw Agustin into the streets with no income and no medical coverage whatsoever for his disabling, FECA-approved occupational pains, agonies, and injuries, and had deprived or violated Agustin's fundamental and substantive Due Process rights or liberty interests to enjoy or exercise his federal statutory and regulatory rights under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995)), in a quite clear error of law, the Claims Court misapplied "*United States v. Fausto*, 484 U.S. 439 (1987)" (App. B-6) and erroneously applied an "'either-or proposition'"-per se rule (J.E.M., 122 S. Ct., at 605) between the CSRA and the Back Pay Act, instead of correctly applying, the quite controlling, Testan-Back Pay Act-case law and our "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974).

The Federal Circuit decided Agustin's case on March 3, 2004. App. A-1 to A-7. (Agustin's Informal Brief before the Federal Circuit is at App. BB-1 to BB-40.) On March 9, 2004, Agustin timely filed his petition for panel rehearing and rehearing en banc (App. CC-1 to CC-19). On April 1, 2004, the Federal Circuit denied Agustin's petition for panel rehearing and rehearing en banc. App. C-1. The jurisdiction of this Court is invoked under 28 USC Section 1254(1). See App. SC5-1 to 7 for chronological relevant court events.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment's constitutional right "to petition" provision; the Fifth Amendment's "due process" provision; and Article IV, Section 1, of our U.S. Constitution. See App. C-2.

The following statutes are involved: Rule 41(b); 28 U. S. C. §2072(b); 28 USC Section 1500; 28 USC Section 1406(a); 28 USC Section 1631; 28 USC Section 1491(a)(1); 28 USC Section 1346(a)(2); 5 USC Section 5596(b)(1)(A)(i); 65 Statute 681, Section 204 (a), (b) (codified at 5 USC Section 6307(a), (b)); 5 USC Section 8118(c). See App. C-3 to C-7.

STATEMENT OF THE CASE

The jurisdiction of the Claims Court was invoked under the Tucker Act (28 USC Section 1491), the Back Pay Act, and our U.S. Constitution's Takings Clause, (not pursuant to the CSRA, Rehabilitation Act, or Title VII).

See App. SC5-1 to 7 for chronological relevant court events for the purposes of 28 USC Section 1500. See App. D-1 to 9 for historical facts and details.

The set of facts in the instant case is materially distinguishable from Keene and all other cases involving the interpretation and application of 28 USC Section 1500. See item 2, (a) thru (k), at App. BB-1 to 5. In Keene, there was **no** Rule 41(b)-"lack of jurisdiction" ruling by another federal court with respect to Keene's claims in the Claims Court.

In a 4-12-95 personnel/pay action (App. E-7 to 8), the Navy removed Agustin based on "unavailability for duty" (App. E-4)—based on his "constitutionally protected conduct" (Arnett, 416 U.S., at 163)—his exercised of his statutory and regulatory rights.[7] See App. D-6 to 7/D-1 to 2.

On 12-18-96, Agustin filed his Rehabilitation Act/Title VII Complaint in the District Court. See App. D-9. As a matter of law, Agustin could not file his Rehabilitation Act and Title VII claims in the Claims Court because that court has "no jurisdiction over such claims" (App. SC9-13).

Agustin, a physically and emotionally disabled, injured, in pain, and in suffering, pro se Complainant, in his 12-18-96 District Court Complaint[8], throughout all the court

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[7] From 12-14-93 to 4-21-95 (the effective date of the Navy's 4-12-95 personnel/pay action): Agustin obeyed the laws and regulations, he has no absence without leave (AWOL), all his absence or "unavailability for duty" (App. E-4) was all authorized or approved absence for the exercised of his statutory and regulatory rights under our *money-mandating* statutes or regulations, was all authorized or approved by, and was all with the blessing of, the federal government. See App. D-1 to 2.

"[T]he protection of [constitutionally protected]...speech" in Black, 123 S. Ct., at 1547, and the protection of "constitutionally protected ["speech" and] conduct" in Arnett, 416 U.S. 134, 162, 163, has "no constitutionally significant distinction" or difference (Hyatt, 123 S. Ct. 1683, 1690 (2003)). See App. Q-5.

[8] In his District Court Complaint, Agustin asserted that: "[Page 19] Federal employees' rights, benefits, and pay, entitlement to which are established by service to public and country and are secured through laws passed by Congress [such as Federal Employees'

proceedings, and all the way up to the U.S. Supreme Court (see App. SC5-5), was confused and erroneously believed that he has also asserted or alleged a Takings claim and a Back Pay Act claim before the District Court: (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2, at App. E-27) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA [Federal Employees' Compensation Act]" (App. E-30) or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71)). See footnote 2 at App. E-27, App. E-30, and App. E-71.

Compensation Act (FECA) and our *money-mandating* federal statutes] are government-created property interests protected by due process...[Page 27] THE REMOVAL ACTION WAS INVALID BECAUSE THE AGENCY IMPROPERLY AND UNFAIRLY DEPRIVED HIM OF A "TERM, CONDITION, OR PRIVILEGE" OF HIS FEDERAL EMPLOYMENT—***THE BENEFIT TO USE*** HIS AVAILABLE SICK LEAVE AND ANNUAL LEAVE (FOR AN ACCEPTED OCCUPATIONAL INJURY AND CONDITION) [pursuant to FECA and our *money-mandating* federal statutes or regulations]—IN RETALIATION FOR HIS EXERCISE OF HIS FECA RIGHTS...[page 28] ***The use of accrued sick leave or annual leave is a benefit*** [pursuant to our *money-mandating* federal statutes or regulations] which is a "term, condition, or privilege" of appellant's federal employment ...In addition, federal employees' pay, and benefits are statutorily created "property interest" [pursuant to our *money-mandating* federal statutes or regulations] which cannot be taken away without due process." Agustin's 12-18-96 District Court Complaint, at pages 19, 27, and 28, (underline in the original), (inserts, bold and italics added).

In Agustin's life, this pro se District Court complaint was the first time he filed any action or complaint in any court for a redress of grievances. Since then, he could not believe that there is ***no justice*** (see App. D-13 to 16) in our federal courts—creation of our U.S. Constitution, which he had volunteered, and had willingly offered, his blood, life, and limbs to fight, protect, and defend as a Vietnam, U.S. veteran. Now, in his nightmarish ***search for justice***, he desperately needs the guarantees and the protections of the same U.S. Constitution, and he could not find nor get one, and he could not obtain true justice.

In a "decision, filed August 9, 1999" (App. B-4), the District Court granted summary judgment for the Navy and against Agustin with respect to all his Rehabilitation Act and Title VII claims. See App. SC5-1. In its 8-9-99 decision, the District Court did ***not*** mention or did ***not*** make any ruling with respect to any Takings claim or any Back Pay Act claim. The District Court also did ***not*** "transfer" any Takings claim or any Back Pay Act claim to the Claims Court pursuant to 28 USC Section 1406(a) or 28 USC Section 1631 (see App. C-4).

On 6-6-00, (#1, at App. C-12), after the District Court's August 9, 1999 decision over Agustin's distinct and different Rehabilitation Act and Title VII claims, (a decision which did ***not*** mention or did ***not*** make any ruling over any Takings claim or any Back Pay Act claim), to protect his fundamental and substantive Due Process right or liberty interest to "pursue and maintain" (SC8-4) a timely and judicially cognizable Back Pay Act and Takings claims in a court of competent jurisdiction, he timely filed his Back Pay Act and Takings claims in the Claims Court, that the Navy:

> [page 13] "***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA--at the time when he needed it most. (See 5 USC Section 8118(c): 'An employee may use annual or sick leave' for a job-related disability; and 20 CFR 10.310(a) [1995]: 'An employee who sustains a job-related disability may use sick or annual leave or both to avoid interruption of income')".

6-6-00, Claims Court Complaint, at 13; also see "statutory right to 'use'" sick leave-claim at 15. See App. SC5-1 to 2; App. D-9 to 10; and App. EE-62, EE-6, EE-14, and EE-13.

On 5-23-01 and on 6-8-01, pursuant to Rule 41(b), the District Court finally made its lack of jurisdiction rulings over the same Back Pay Act or Takings claim:

> (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2 at App. E-27) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA" (App. E-30) or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71). App. E-27, E-30, and E-71. Pursuant to Rule 41(b), the District Court ruled that: (1) Agustin "**never asserted**" a "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2, at App. E-27, (bold added)); and (2) that Agustin "**failed to allege these violations** in his [District Court] Complaint" (App. E-30, (bold added)), or that Agustin "**never alleged** a cause of action under these statutes and regulations" (App. E-71, (bold added)). "Therefore, because plaintiff [Agustin] **failed to allege** these violations in his Complaint, this Court ***cannot*** **adjudicate** those claims." App. E-30, (bold and underline added). See App. SC5-2 to 4.

See App. E-23 to E-31—District Court's 5-23-01 Order and App. E-69 to E-72—District Court's 6-8-01 Order[9]; App. SC8-1 to 5, SC9-8 to 9; and App. CC-7 to 8, App. BB-15.

The District Court did not make its final, "lack of jurisdiction" rulings over the same Back Pay Act and Takings claims based on "motion for voluntary dismissal" ground (Keene, at 203), "sovereign immunity" ground

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[9] These District Court Orders have "**become absolutely final**" (App. SC5-5) when this Court denied Agustin's petition for certiorari in Agustin v. England, ___ U.S.___, 123 S. Ct. 903 (2003) (1-13-03).

(Keene, at 204), statute of limitations ground, or any other grounds, but pursuant to Rule 41(b)'s "lack of jurisdiction" exception provision. ***With no justice***, it also ruled that "the [District] Court believes that amendment of the Complaint at this late juncture—more than four years after the inception of the suit—would prejudice defendant, plaintiff may not now seek relief pursuant to these statutes and regulations". App. E-71 to E-72. To make matters worst for Agustin, ***contrary to the interest of justice***, the District Court refused or failed to "transfer" (Keene, at 215 n. 11), pursuant to 28 USC Section 1406(a) or 28 USC Section 1631 (see App. C-4), the same judicially cognizable Back Pay Act or Takings claims to the Claims Court.[10] See App. D-12; App. SC5-2 to 4.

Agustin duly presented the District Court's Rule 41(b)-"lack of jurisdiction" rulings over the same Back Pay Act and Takings claims before the Claims Court and before the Appeals Court. See App. SC8-1 to 5; 07/26/2001, #18, #19, and #20, at App. AA-1 or C-13 concerning the District Court's 5/23/01 Order; SC9-8 to 9, (10/11/2001, #34, at App. AA-2 or C-15, wherein the District Court's 6/8/01 Order was attached); and see his Informal Brief before the Appeals Court at footnote 3 at App. BB-4, and at App. BB-15.

On 9-5-03, in a Due Process-violative, ***no-justice*** Order (App. B-1 to B-8), the Claims Court refused or failed to consider, discuss, or mention the Due Process-controlling effect and the *res judicata* (issue of jurisdiction-preclusion) effect of the District Court's 5-23-01 and 6-8-01, "**absolutely final**" (App. SC5-5), Rule 41(b)-"lack of jurisdiction" rulings that Agustin has "never alleged" (App.

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[10] In the instant case, ***in violation of, or contrary to, the interest of justice***, the District Court refused or failed to "transfer" any judicially cognizable Back Pay Act and Takings claims to the Claims Court pursuant to 28 USC Section 1406(a) or 1631. See Keene, 508 U.S. 200, 215 n. 11 (1993). See these statutes at App. C-4.

E-71) or "never asserted" (footnote 2, at App. E-27) "the same [Back Pay Act or Takings] claim" (Keene, at 216) based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) or "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13) before the District Court. Mystifyingly, ***with no justice***, it ruled that pursuant to 28 USC Section 1500, it also lack jurisdiction over Agustin's Back Pay Act and Takings claims, and alternatively, that the complaint failed to state a claim. See App. SC5-5 to 6.

On 3-3-04, the Federal Circuit, in a boiler plate, Due Process-violative, ***no-justice*** opinion (App. A-1 to 7), also refused or failed to consider, discuss, or mention the Due Process-controlling effect and the *res judicata* (issue of jurisdiction-preclusion) effect of the District Court's 5-23-01 and 6-8-01, final, Rule 41(b)-lack of jurisdiction rulings that Agustin "failed to allege" (App. E-30) or has "never alleged" (App. E-71) "the same claim" (Keene, at 216) "[p]ursuant to the Back Pay Act" (App. A-3) before the District Court. ***With no justice at all***, it affirmed and rubber-stamped the Claims Court's 9-5-03, 28 USC Section 1500-lack of jurisdiction ruling over Agustin's Back Pay Act and Takings claims in the Claims Court. See App. SC5-6 to 7.

REASONS FOR GRANTING THE WRIT

(1) The Claims Court's and the Federal Circuit's refusal or failure to consider and enforce this Court's quite controlling Rule 41(b)-case law, its Rules Enabling Act-case law, its Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), its federal *res judicata*-case law with respect to the District Court's Rule 41(b)-"lack of jurisdiction" rulings, and our U.S. Constitution's First Amendment's ***guarantee*** of the right "to petition" our federal courts "for a redress of grievances" and our Fifth Amendment's "due process"

guarantee of the rights to be heard, and to have a fair and full hearing, is, and would be, a continuing ***travesty or miscarriage of justice*** against **all current and future litigants** whose claims involve the interpretation and application of both Rule 41(b)'s "lack of jurisdiction" exception provision and 28 USC Section 1500.

The Claims Court's Order, and the Federal Circuit's boiler-plate opinion, have no "evaluation of the [most relevant] facts" (see item 2, (a) thru (k), at App. BB-1 to 5) and no "analysis of the [controlling] law" (Protective Committee v. Anderson, 390 U.S. 414, 434 (1968))[11] (see App. BB-6; CC-1 to CC-3). Both opinions have no judicial review or evaluation of: (1) the Due Process-controlling effect of the District Court's, final, 5-23-01 and 6-8-01, Rule 41(b)-"lack of jurisdiction" rulings that Agustin has "never alleged" (App. E-71) "the same [Back Pay Act or Takings] claim" (Keene, at 216) in the District Court; (2) the District Court's refusal to allow Agustin to amend his Complaint to include such claims, and (3) the District Court's refusal or failure to "transfer" any such judicially cognizable claims to the Claims Court pursuant to 28 USC Section 1406(a) or 28 USC Section 1631 (see App. C-4). Both opinions also have no analysis of Rule 41(b), the Rules Enabling Act, this Court's Rule 41(b) and Rules Enabling Act-case laws, its Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), the federal *res judicata* (issue of jurisdiction-preclusion) effect of such Rule 41(b)-"lack of jurisdiction" rulings over the same Back Pay Act and Takings claims, and

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[11] "It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." Protective Committee v. Anderson, 390 U.S. 414, 434 (1968).

our U.S. Constitution's First and Fifth Amendments. See App. BB-12 to BB-13.

In **all** cases with a quite controlling material fact such as in the instant case—a district court's valid and final Rule 41(b)-"lack of jurisdiction" ruling over ***a claim***, Rule 41(b) precludes the application of 28 USC Section 1500 over ***the same claim*** in the Claims Court.

(2) Based on all the above relevant and controlling facts and case laws, the Federal Circuit's 3-3-04, affirmance of the Claims Court's 9-5-03, 28 USC Section 1500-ruling that the Claims Court also lack jurisdiction over Agustin's timely filed and judicially cognizable Back Pay Act and Takings claims deprived or violated Agustin's First Amendment right "to petition" our federal courts "for a redress of grievances"[12], and his fundamental and substantive Fifth Amendment "due process" rights to ***truly*** have his day in court with respect to the merits of: (a) his claim that Rule 41(b) precludes the application of 28 USC Section 1500 over Agustin's Back Pay Act and Takings claims in the Claims Court; and (b) his timely filed and judicially cognizable Back Pay Act and Takings claims in the Claims Court—his Due Process rights to be heard, and to have a fair and full hearing, on the merits of such claims. See U.S. Constitution, Amendment I and Amendment V.

With all due respect, the Appeals Court's 3-3-04 *no-justice* opinion ***produces absurd and unconscionable unconstitutional result or condition***. "Nothing in the statute

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[12] "We have also considered the right to petition when interpreting federal law…We thus made explicit that 'the right to petition extends to all departments of the Government,' and that '[t]he right of access to the courts is…but one aspect of the right to petition.' [404 U.S.] at 510." BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002). See App. J-1 to 2.

[here, 28 USC Section 1500,] commands courts to shut their eyes to the Constitution or to deny a full and fair hearing when performing their [judicial or appellate] functions". Estep v. U.S., 327 U.S. 114, 127 (1946). Since the District Court (pursuant to FRCP Rule 41(b)'s "lack of jurisdiction" exception provision), and then the Claims Court (pursuant to 28 USC Section 1500's "shall not have jurisdiction" provision), have ruled that ***both courts lack jurisdiction*** over *the same* judicially cognizable Back Pay Act and Takings claims, and since the Appeals Court has rubber-stamped and affirmed the Claims Court's 28 USC Section 1500-lack of jurisdiction ruling over such claims in a boiler-plate opinion with no "judicial review" (Estep, at 120)—no consideration, discussion, nor mention of Rule 41(b), our quite controlling, U.S. Supreme Court's Rule 41(b) and Rules Enabling Act-case laws, and the federal *res judicata* (issue of jurisdiction-preclusion) effect of the District Court's final, Rule 41(b)-"lack of jurisdiction" rulings over the same Back Pay Act and Takings claims, ***where and how on earth could Agustin enjoy and exercise his fundamental and substantive First and Fifth Amendment constitutional rights with respect to his timely filed and judicially cognizable Back Pay Act and Takings claims***? See App. CC-12 to 13.

The Appeals Court's 3-3-04 opinion is ***unconstitutional***. *Without this Court's mercy and justice*, it deprives Agustin **forever** of his fundamental and substantive First Amendment right "to petition the government for a redress of grievances", and it also deprives him **forever** of any judicial forum to enjoy or exercise his fundamental and substantive Fifth Amendment "due process" rights to be heard, and to have a fair and full hearing, on the merits of: (a) his claim that Rule 41(b) precludes the application of 28 USC Section 1500 over Agustin's Back Pay Act and Takings claims in the Claims Court; and (b) his timely filed and judicially cognizable Back Pay Act and Takings claims in

the Claims Court—claims upon which relief could be granted pursuant to the Tucker Act, the Back Pay Act, and our U.S. Constitution's Takings Clause.[13] Based on the District Court's final, Rule 41(b)-lack of jurisdiction rulings over *the same* Back Pay Act and Takings claims, the Appeals Court's 3-3-04 opinion is in violation of, or contrary to, our U.S. Constitution's First and Fifth Amendment provisions, and it violates or deprives Agustin's First and Fifth Amendment constitutional rights.[14]

(3) Here, based on the District Court's final, Rule 41(b)-"lack of jurisdiction" rulings over *the same* Back Pay Act and Takings claims, which cover the period from 12-18-96 to present, Agustin's case is quite unique and exceptional, and the set of facts and the whole picture are materially distinguishable from any and all the other cases involving the interpretation and application of 28 USC Section 1500,

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[13] "No person [including Agustin] shall...be deprived of...property, without due process of law". U.S. Constitution, Fifth Amendment, (bold and underline added). Under the "property" component of the Fifth Amendment's Due Process Clause, Agustin has a fundamental and substantive, constitutional right to be heard, and to a fair and full hearing, on the merits of his claims, which the Appeal's Court's Due Process-violative opinion has deprived from Agustin.

[14] The right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights". Mine Workers v. Illinois Bar Assn., 389 U. S. 217, 222 (1967). "The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v. Avery, 393 U.S. 483, 485; Ex parte Hull, 312 U.S. 546, 549". California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances". Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983).

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U. S. 385, 394 [1914]. Our U.S. Supreme Court has acknowledged that the due process guarantee "includ[es] the right to be heard where liberty or property is at stake in judicial proceedings". Ownbey v. Morgan, 256 U.S. 94, 111 (1921).

including Keene and Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc). "By precluding jurisdiction over the claim of a plaintiff with a suit pending in another court 'for or in respect to' the same claim, [28 USC Section] **1500 requires a comparison** between the claims raised in the Court of Federal Claims and in the other lawsuit." Keene, at 210, (bold and underline added). See App. CC-8 to CC-9; also see App. SC4-1.

The Claims Court and the Federal Circuit committed ***quite clear injustice***—an error of fact and of law when both courts refused or failed to consider or discuss that "**Agustin has never had any 'pending' (28 USC Section 1500) Takings claim or Back Pay Act claim before the District Court**"[15] (App. SC5-5), and that the required "comparison between the claims" in the two Complaints (in the District Court and in the Claims Court) is not possible as a matter of fact and of law because **there was no "comparable claim[]" to compare with from 12-18-96 to present** (Keene, at 210, (bold and underline added)), which include the date or "time-of-filing" (Keene, at 208) of Agustin's Claims Court Complaint on 6-6-00. ***How could a Back Pay Act claim based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) be "pending" (28 USC Section 1500) in the District Court when Agustin has "never alleged" (App. E-71) such claim in the District Court?***

In the District Court, there was ***no final judgment on the merits*** of Agustin's Back Pay Act and Takings claims, and the Federal Circuit's affirmance of the Claims Court's 28 USC Section 1500-lack of jurisdiction ruling over such

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[15] See Black's Law Dictionary 1154 (7th ed. 1999) (defining pending as "[r]emaining undecided; awaiting decision"); also see App. SC4-1 for an excellent discussion of the term "pending" in Young and Young v. U.S., CFC 02-1368C (4-19-04) in the internet at: http://www.uscfc.uscourts.gov/Opinions/Wolski/04/WOLSKI.Young.pdf

claims is also in violation of, or is contrary to, our U.S. Supreme Court's Rule 41(b)[16]-case law in Costelo v. United States, 365 U.S. 265, 286 (1961) (or "Costelo") and in Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek'). See App. CC-9 to 10, and App. P-1 to 2.

Here, the District Court's Rule 41(b)-"lack of jurisdiction" rulings have *res judicata* (issue of jurisdiction-preclusion) effect but no claim preclusive effect. The Back Pay Act or Takings claims in the District Court, pursuant to Rule 41(b), "was dismissed for... want of jurisdiction...which did not go to the merits of the action, [and] the judgment rendered [by the District Court that it "cannot adjudicate those claims" (App. E-30) because Agustin has "never alleged" (App. E-71) such Back Pay Act claim or Takings claim before the District Court] **will prove *no* bar to another suit**" in a court of competent jurisdiction such as the Claims Court. Costelo, at 286, (bold, italics, and underline added). See App. BB-16 to 18.

The Federal Circuit's opinion is also in violation of, or is contrary to, the Rules Enabling Act (28 U. S. C. §2072(b)) and this Court's Rules Enabling Act-case law. By its refusal or failure to consider the District Court's Rule 41(b)-"lack of jurisdiction" rulings, it deprived Agustin's substantive First and Fifth Amendment rights to ***truly*** have his day in court with respect to the merits of his Back Pay Act and Takings claims. The Claims Court's and the Federal Circuit's decisions deprived or violated Agustin's fundamental and substantive rights to enjoy his First

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[16] FRCP Rule 41(b) "is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988).

Amendment right "to petition" and to file a timely and judicially cognizable Back Pay Act and Takings claims in a court with competent jurisdiction such as the Claims Court, and to enjoy his Fifth Amendment "due process" rights to be heard, and to have a fair and full hearing, on the merits of such claims.[17]

Furthermore, Agustin's Tucker Act-Back Pay Act claim and his Tucker Act-Takings claim are each over $10,000 and our U.S. Supreme Court's Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999)[18] is quite controlling with respect to the Claims Court's "exclusive jurisdiction" over such "nontort claims". Id., at n. 13. See his Back Pay Act claim (CLAIM 4) at App. G-2, and his Takings claim (CLAIM 6, which includes CLAIM 1 and 2) at App. G-1 to G-2. Agustin "could not, as a matter of law, have raised [his Tucker Act-] takings claims [and his Tucker Act-Back Pay Act claim] under the prior [District

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[17] "[A] Rule made law by Congress supersedes conflicting laws." Henderson v. United States, 517 U.S. 654, 668 (1996). "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rules Enabling Act, 28 U. S. C. §2072(b). "In enacting §2072(b)...Congress expressly provided that laws inconsistent with the procedural rules promulgated by this Court would automatically be repealed upon the enactment of new rules in order to create a uniform system of rules for Article III courts." Clinton, President of the United States, et al. v. City of New York, 524 U.S. 417, 446 n. 40 (1998).

Here, based on the facts, 28 USC Section 1500 is in conflict, or is inconsistent, with Rule 41(b) and should not be applied.

[18] "[Footnote] 13: Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over nontort claims against the Government for greater than $10,000. See 28 U. S. C. §1491...[Footnote] 14: The "Little Tucker Act," 28 U. S. C. §1346(a)(2), confers jurisdiction on district courts for claims of $10,000 or less...". Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), (underline added). Also see App. SC6-1.

Court] litigation" (Adams v. The United States, CFC No. 00-447C (August 11, 2003), at footnote 9, page 8 of opinion)[19]. See App. SC6-1, and App. R-7 to 8. Here, had the District Court ruled that Agustin has asserted or alleged his Back Pay Act and Takings claims in the "District Court action[]", such claims "could [] have been[] dismissed on the ground of falling within the exclusive jurisdiction of the Court of Federal Claims". See Keene, at 216-217 (1993). See App. CC-10, and App. BB-18 to 20.

Lastly, our U.S. Constitution's Full Faith and Credit Clause and/or federal ***res judicata***-(issue preclusion) rules or case law apply to the District Court's final, Rule 41(b)-"lack of jurisdiction" rulings over the same Back Pay Act and Takings claims.[20] See U.S. Constitution, Article IV, Sec. 1. See App. CC-10 to 11, and BB-15.

The issue that Agustin has "never alleged" (App. E-71) "the same [Back Pay Act or Takings] claim" (Keene, at 216) based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) has been fully "litigated between the

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[19] See the Adams v. The United States opinion in the Internet at: http://www.uscfc.uscourts.gov/Opinions/Block/03/BLOCK.Adams.pdf See App. SC6-1.

[20] "See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1604 (3d ed. 1988) ('It is clear that, where the federal court decided a federal question, federal res judicata rules govern')". Heck v. Humphrey, 512 U. S. 477, 488-489, n. 9 (1994). "In federal-question cases, the law applied is federal law. This Court has noted, 'It has been held in non-diversity cases, since Erie R. Co. v. Tompkins, that the federal courts will apply their own rule of res judicata.' Heiser v. Woodruff, 327 U.S. 726, 733 (1946)." Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U. S. 313, 324, n. 12 (1971). "[W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" Stoll v. Gottlieb, 305 U.S. 165, 170 (1938).

same parties"[21] in the District Court and "**has become absolutely final**" (App. SC5-5). Also see App. SC9-11 to 12. The District Court has made "a valid and final" (Ashe, 397 U.S., at 443) Rule 41(b)-"lack of jurisdiction" judgment that it "cannot adjudicate those claims" (App. E-30) because Agustin has "never alleged" (App. E-71) such claims before the District Court.[22] Agustin submits that the Claims Court and the Appeals Court are bound by our U.S. Constitution's Full Faith and Credit provision and/or by our federal ***res judicata*** (issue preclusion) rules or case law with respect to the jurisdiction issue of the District Court's final, Rule 41(b)-"lack of jurisdiction" judgment over the same Back Pay Act and Takings claims. See App. CC-11. The District Court's Rule 41(b)-"lack of jurisdiction" judgment over the same Back Pay Act or Takings claim based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) "**have federal *res judicata* (issue of jurisdiction-preclusion) effect**" (App. SC5-2). "Any other conclusion strikes down the very foundation of the doctrine of res judicata, and permits...[another federal court] to deprive a party of the benefit of its most important principle". Deposit Bank of Frankport v. Board of Councilmen of the City of Frankport, 191 U.S. 499, 520 (1903).

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[21] "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970).

[22] "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702 n. 9 (1982). "[W]e have long held that States [or other federal courts] cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes. See *Stoll* v. *Gottlieb*, 305 U. S. 165, 171-172 (1938); *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 290-291 (1906); *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 514-515 (1903)." Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001).

In summary, "[i]n this case, the practicalities weigh heavily in favor of" (Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989)) a decision that: (1) Rule 41(b) precludes the application of 28 USC Section 1500; (2) that the Appeals Court's 3-3-04, rubber-stamp and boiler-plate opinion, ***produces absurd and unconscionable unconstitutional result or condition***, is ***unconstitutional***, and deprives Agustin's First Amendment right "to petition" our federal courts "for a redress of grievances" and his Fifth Amendment "due process" rights to be heard, and to a fair and full hearing; (3) and that such opinion is in violation of, or is contrary to: (a) Rule 41(b); (b) this Court's Rule 41(b)-case law in Costelo, 365 U.S., at 286, and in Semtek, 531 U.S., at 500-506; (c) the Rules Enabling Act; (d) this Court's Rules Enabling Act-case law; (e) its Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999); and (f) our U.S. Constitution's Full Faith and Credit provision (Article IV, Section 1) and/or our federal ***res judicata*** (issue preclusion) rules or case law.

(4) With respect to Agustin's underlying Back Pay Act and Takings claims, in the interest of ***equal justice for all***, pursuant to this Court's power of supervision, and based on the momentous, exceptional, and national importance and significance of the issues involved, this Court should take action, address, and stop our federal courts' ongoing ***unconstitutional injustice***—its ongoing ***unconstitutional deprivation*** of our civil servants' First Amendment right "to petition" our federal courts "for a redress of grievances" and their Fifth Amendment "due process" right to be heard, and to a fair and full hearing on the merits of their judicially cognizable Back Pay Act claims. See App. CC-14 to 18.

All our federal courts' ongoing application of an "'either-or proposition'"-per se rule (J.E.M. Ag Supply, Inc.

v. Pioneer Hi-bred International, Inc., 122 S. Ct. 593, 605 (2001) between the Civil Service Reform act (CSRA) and the Back Pay Act with respect to statutory coverage, or with respect to competent jurisdiction over such Back Pay Act claims between the Merit Systems Protection Board ("MSPB" or "Board") and the U.S. Court of Federal Claims (or "Claims Court") in personnel/pay action cases which involve a violation of our money-mandating federal statutes or federal regulations or "wrongful deprivation of pay" (United States v. Testan, 424 U.S. 392, 406 (1976) is ***unconstitutional*** because it deprives our civil servants' First and Fifth Amendment rights. See App. BB-27 to 30.

All our federal courts' ongoing application of an "'either-or proposition'"-per se rule (J.E.M., 122 S. Ct., at 605) in such personnel/pay action cases, such as in the instant case, is contrary to this Court's governing law because **the CSRA and the Back Pay Act "are capable of coexistence"** (Mancari, 417 U.S., at 551, (bold and underline added)), and these two "statutes do not pose an either-or proposition" (J.E.M., at 605). See Testan, 424 U.S. 392, 405-406. A personnel/pay action "'do[es] not pose an either-or proposition'" between the CSRA and the Back Pay Act and could be unlawful under the Back Pay Act. J.E.M., at 605. A personnel/pay action, which violates our money-mandating statutes or regulations, is unlawful, and is covered, under Tucker Act and the Back Pay Act, and the Claims Court has jurisdiction over such claims.[23] The CSRA "does not reach" (Germain, 503 U. S., at 253) "distinct cases" (J.E.M., 122

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[23] The Claims Court is "a court", an "appropriate authority" "to correct or direct the correction of an unjustified or unwarranted personnel action" such as the Navy's "failure to...confer [Agustin's pay, rights, or] benefit[s]" to which Agustin "is entitled by statute or regulation" pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2), or 20 CFR Section 10.310(a) (1995). 5 CFR Section 550.803.

S. Ct., at 605) of personnel/pay actions involving a violation of our money-mandating statutes or "wrongful deprivation of pay" (Testan, 424 U.S., at 406) but the Back Pay Act does.

All our federal courts apply an ongoing, ***no-justice*** misinterpretation of United States v. Fausto, 484 U.S. 439 (1987) (or "Fausto"). In Worthington v. U.S., 168 F.3d 24, 27 (Fed. Cir. 1999), that Court, (which has exclusive jurisdiction to review MSPB's personnel action cases), applied an "'either-or proposition'"-per se rule (J.E.M., 122 S. Ct., at 605) that: "[t]his court has noted that Fausto deprives the Court of Federal Claims of jurisdiction over personnel actions covered by the CSRA." However, based on the whole and total jurisprudence picture, such an ongoing per se rule is in violation of, or is contrary to, this Court's governing case laws—its "two statutes are capable of coexistence"-case law in Mancari (417 U.S., at 551) and in Germain and J.E.M; its Back Pay Act-case law in Testan; its "*expressio unius est exclusio alterius*"-case law[24] in

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[24] The Civil Service Reform Act's explicit mention of "any action which is appealable to the Board under any law, rule, or regulation" excludes any action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (underline added). *Expressio unius est exclusio alterius.* This Court's recent interpretation and affirmation of its *expressio unius est exclusio alterius*-case law in Swierkiewicz v. Sorema N. A., 122 S. Ct. 992, 998 (2002) and in TRW v. Andrews, 122 S. Ct. 441, 447 (2001) are controlling authorities with respect to the threshold issue that the Board (or MSPB) lacks jurisdiction over Agustin's judicially cognizable claim of the Navy's violation of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2), and that the Claims Court has jurisdiction over such violation pursuant to the Tucker Act and the Back Pay Act. This judicial cannon or doctrine case law--*expressio unius est exclusio alterius*—is quite controlling in the instant case and in **all** such personnel/pay action cases which involve a violation of our money-mandating federal statutes or regulations or "wrongful deprivation of pay" (Testan, at 406). See App. L-1 to 4. Also see Worthington, 168 F.3d, at 27, or footnote 16 at App. BB-23.

Swierkiewicz v. Sorema N. A., 122 S. Ct. 992, 998 (2002) and in TRW v. Andrews, 122 S. Ct. 441, 447 (2001); and its "fair interpretation" rule or "fair inference"-case law[25] in United States v. White Mountain Apache Tribe, 123 S. Ct. 1126, 1132 (2003).[26] Such a per se rule, and the Claims Court's application of such a per se rule in this case, are in violation of, or contrary to, these controlling case laws.

Worthington's "'either-or proposition'"-per se rule (J.E.M., 122 S. Ct., at 605) with respect to competent jurisdiction between the MSPB and the Claims Court, which unjustly affect Agustin, has ongoing ***no-justice*** effect against all our poor civil servants, is ***unconstitutional*** because such ongoing per se rule unconstitutionally deprives our civil servants of their constitutional rights to enjoy or exercise their First Amendment right "to petition" our federal courts "for a redress of grievances" and their Fifth Amendment "due process" right to be heard, and to a fair and full hearing, on the merits of their Tucker Act-Back Pay Act claims when federal or postal employers, through a personnel/pay action, violate any one of our money-mandating federal statutes and federal regulations. See App. BB-23, L-4, and SC9-17 to 18.

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[25] "This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. 'Because the Tucker Act supplies a waiver of sovereign immunity for claims of this nature, the separate statutes and regulations **need not** provide a second waiver of sovereign immunity, nor need they be construed in a manner appropriate to waivers of sovereign immunity'...that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages...a fair inference will do." White Mountain, 123 S.Ct., at 1132, (bold and underline added). See App. BB-26, and App. M-3 to 4.

[26] "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991).

Here, Agustin, an injured, in pain, and in suffering employee, "alleges that" he "was the victim of" (Davis v. Monroe County Board of Education, 526 U.S. 629, 653 (1999)) ***the Navy's violation of our money-mandating federal statutes and regulations***; that such violation through a personnel/pay action is not covered under the CSRA, the Rehabilitation Act, or Title VII; that such action was "void ab initio, unlawful" (SC9-22), and is covered, under the Tucker Act and the Back Pay Act; that the Claims Court has exclusive jurisdiction over such violation which involve claims above $10,000 each claim; that the "Board", "EEOC", and "the district court" (App. A-3 to 4) have no jurisdiction over such violation; that such ***violation of his*** "clearly established statutory [or regulatory ***rights to use*** sick leave] or constitutional right[] [to medical care or treatment] which a reasonable person would have known" (Harlow, 457 U.S., at 818) and "'deliberate indifference' to [Agustin's] health or safety" (Hope, 122 S. Ct., at 2514), had aggravated his injuries or conditions (resulting in "major depression…post-traumatic stress disorder…[and] organic brain syndrome" (App. EE-32))[27]; and that such "allegations…state claims upon which relief could be granted under" the Tucker Act and the Back Pay Act (Swierkiewicz, 122 S. Ct., at 999). See App. BB-9 to 11, BB-24 to 26. In its First and Fifth Amendments-violative, ***no-justice*** Order (App. B-1 to 8), the Claims Court refused or failed to consider, discuss, or even mention the Tucker Act and the Back Pay Act which Agustin has duly presented. See item 3, at App. BB-5 to 6; and App. J-1.

"'[F]ederal agencies must obey all federal laws"' at all times. FCC v. Next Wave Personal Communications

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[27] "With regard to medical needs [or "medical care or treatment" (SC9-11)], the due process clause imposes, at a minimum, the same duty the Eight Amendment imposes". Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th. Cir. 2002), cert. den. 123 S. Ct. 872.

Inc., 122 S. Ct. 832, 838 (2003), (citation omitted, bold and underline added). See App. BB-31, and CC-18. Here, ***the Navy's statutory and regulatory legal duties and obligations*** under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Section 6303, 5 USC Section 8118(c), 5 CFR Section 630.401(a)(1), (2), or 20 CFR Section 10.310(a) (1995) ***have been triggered***[28] (see App. EE-62, EE-6, EE-14, and EE-13), and the Navy could have lawfully separated Agustin *without violating* his constitutionally protected property, rights, or interests pursuant to these money-mandating authorities by simply obeying such laws or regulations and allowing Agustin to enjoy or exercise his liberty interest or Due Process "'***right to...use***''' (Philips, 524 U.S. 156, 170 (1998) (bold and italics added)) sick leave until his leave account "becomes exhausted" (App. EE-6).[29]

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[28] Like under the Family and Medical Leave Act (FMLA), under the Sick Leave Act (5 USC Section 6307), "[t]o trigger employer's [Sick Leave Act duties and] obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave". See Ragsdale v. Wolverine, 122 S.Ct. 1155, 1166 (2002) (Justice O'Connor, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting), and see, accord, 5 CFR Sections 630.401, 402, and 403. Also see SC9-13 to 15.

[29] Our civil servants are not inferior citizens, and like our private sector employees, they have the same constitutional Equal Protection right (see App. N-1 to 3) to enjoy their constitutionally protected property, rights, or interests such as their "right to take sick leave" (Hambsch, at 1058), their "'right to...use''' (Philips, at 170) sick leave, or their right to take or use FMLA-leave (compare Mann, 120 F.3d 34 and Russell, 191 F.3d 1016). A federal employee's leave account is the private property of such employee for the purposes of our Takings Clause, and such employee has a fundamental and substantive, liberty interest or Due Process "'right to...use''' such leave account. Philips, id., at 170. Here, the government also physically took Agustin's property, rights, or interests without just compensation, in violation of our Just Compensation Clause, through its 4-12-95 personnel/pay action "to promote the efficiency of the service" (App. E-8) "in accordance with the provisions of references (a) [CPI (Civilian Personnel Instructions) 339] and (b) [CPI 752]" (App. E-4). See App. O-4 to 5.

These statutes or regulations are all money-mandating "applicable law[s]…[or] regulation[s]" (5 USC 5596(b)(1)) within the meaning of the Back Pay Act, and the "erroneous denial of [Agustin's "approved" (App. EE-6)] request for paid [sick] leave was an 'unwarranted personnel action' which entitled him to an award of lost wages against the United States" (Hambsch, 490 U.S., at 1056).[30] See App. BB-26. No federal employer is above the law. ***No federal employer could obey the CSRA and disobey and violate our money-mandating federal statutes or federal regulations, at the same time in the same action***.[31] See App. K-1 to 4.

"[T]he dichotomy between personal liberties and property rights is a false one…The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, [] a savings account" or a leave account. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). See App. BB-31 to 36.

[30] "There is little doubt that the violation of 5 U.S.C. [6307] alleged by [Agustin] here is exactly the type of 'unwarranted personnel action' addressed by the Back Pay Act… 'In 5 U.S.C. [6307], Congress established a statutory right to'" "to take sick leave". See Hambsch, at 1057, 1058, (citation omitted). 5 CFR Section 630.401(a)(1), (2) gives employers no discretion to deny sick leave, and commands in unmistakable and unambiguous mandatory language that: "[A]n agency ***must grant sick leave*** to an employee when the employee" is "receiv[ing]…medical…treatment" or "[i]s incapacitated for the performance of duties by…injury". 5 CFR Section 630.401(a)(1), (2) (bold and italics added); see App. C-6 to 7. App. EE-14—Dr. Chattha's 3/6/95 medical report—has established that Agustin's was "receiv[ing]…medical…treatment" and that his "incapacitation" for work due to his FECA-approved "injury" would continue for 90 days or longer, or up to about 6/6/95, and he has ***right to use*** sick leave. Id.

[31] However, for undue "burden" (see the Board's decision, at App. B-2; and EEOC's decision, at App. B-4), for "undue hardship" (see District Court's decision, at App. B-5), or for whatever reason, if the Navy or any federal employer could not perform or "promote the efficiency of the service" (5 USC Section 7513(a)) while obeying our money-mandating federal statutes and federal regulations at the same time, then it should come to our U.S. Congress for relief rather than disobeying and violating such statutes and regulations and our civil

This Court should take immediate action to put an end to such ongoing per se rule which produces continuing ***unconstitutional injustice*** against all our poor civil servants, and which makes our civil servants' money-mandating statutory and regulatory rights and the Back Pay Act ***meaningless and useless***. See App. BB-31, CC-18.

Without justice **from this Court, with respect to our civil servants' statutory or regulatory rights pursuant to our money-mandating federal statutes or regulations, all our poor civil servants have been, are being, and will be, treated like inferior or second class citizens by all our federal courts, through their continuing refusal or failure to enforce the Back Pay Act and this Court's well established, "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974), Connecticut Nat. Bank v. Germain, 503 U. S. 249, 253 (1992), and J.E.M. Ag Supply, Inc. v. Pioneer Hi-bred International, Inc., 122 S. Ct. 593, 605 (2001), in personnel/pay action cases involving a violation of such money-mandating federal statutes or regulations.**

CONCLUSION

Where is justice?

Respectfully submitted, through, and with help and assistance from friends,

REMIGIO I. AGUSTIN, Petitioner, pro se

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servants' constitutionally protected property, rights, or interests under such authorities, with impunity. "[T]he 'proper theater' for such [relief]…'is the halls of Congress'… and [this Court should] therefore enforce the statute [the Back Pay Act]". Keene, 508 U.S., at 217-218.

INDEX TO APPENDIX

APPENDIX (or "App.")

FEDERAL CIRCUIT'S OPINION:

A-1 to A-7 Federal Circuit's 3-3-04 per curiam opinion. (BB-1 to BB-40, below, is Agustin's Informal Brief before the Federal Circuit).

(Note 1: To avoid confusion, the copy of the Claims Court's docket entries are designated here, below, as App. C-11 to C-20. The said docket entries were designated before the Federal Circuit as A-1 to A-10).

CLAIMS COURT'S PROCEEDINGS:

B-1 to B-8 Claims Court's 9-5-03 Order.

B-9 Claims Court's 9-8-03 Judgment.

FEDERAL CIRCUIT'S ORDER ON REHEARING:

C-1 Federal Circuit's April 1, 2004, Order denying rehearing.
(CC-1 to CC-19, below, is Agustin's Petition for Panel Rehearing and Rehearing En Banc).

CONSTITUTIONAL PROVISIONS:

C-2 Amendments I and V of the U. S. Constitution, and Article IV, Section 1.

STATUTORY PROVISIONS:

C-3	Federal Rules of Civil Procedure (FRCP) Rule 41(b)
C-4	28 USC Section 1406(a)
C-4	28 USC Section 1631
C-4	28 USC Section 1491(a)(1)
C-5	28 USC Section 1346(a)(2)
C-5 to C-6	5 USC Section 5596(b)(1)(A)(i)
C-6	65 Statute 681, Section 204(a), (b)
C-6 (C-6 to C-7	5 USC Section 6307(a), (b) 5 CFR Section 630.401(a)(1), (2))
C-7 (C-7	5 USC Section 8118(c) 20 CFR Section 10.310(a) (1995))

OTHER MATERIALS PURSUANT TO RULE 14.1(i)(vi):

C-11 to C-20	Claims Court's Docket--CIVIL DOCKET FOR CASE #: 1:00-cv-00335 -JFM; REMIGIO I. AGUSTIN V. USA, (which were designated before the Federal Circuit as App. A-1 (here, C-11) to A-10 (here, C-20).)
D-1 to D-21	HISTORICAL BACKGROUND AND SET OF FACTS

(Note 2: All the following records below, from E-2 to CC-19, were duly presented by Agustin before the Federal Circuit).

E-2 to E-3 — Pages 12-13 of 12-21-95 MSPB Hearing transcript (see transcript from line 25 of page 12 thru line 3 of page 13), which had established that the employing agency did not fill Agustin's former P&E position with a permanent appointment after Agustin's removal on 4-21-95.

E-4 to E-5 — ADVANCE NOTICE OF PROPOSED SEPARATION, based on the disciplinary action charge of "unavailability for duty".

E-6 — 2-28-95, Navy's Memorandum approving Agustin's 2-16-95 Application for Sick Leave until his annual and sick leave accounts "become[] exhausted". (See App. EE-6 below for the same (formatted) Memorandum.)

E-7 to E-8 — DECISION ON PROPOSED SEPARATION dated April 12, 1995.

E-11 — Page 22 of MSPB's 12-21-95 Hearing Records (see lines 9, and 13 thru 14, of App. E-11), wherein MSPB Administrative Judge Lee ruled that the Navy's personnel action against Agustin was "a disciplinary action as far as the Board is concerned".

E-13 Agustin's Leave and Earnings Statement for the two week-pay period ending 04/29/95 showing his unused and remaining, 444.8 hours of accumulated annual leave and 252.9 hours of accumulated sick leave. (See App. EE-13 below for the same (formatted) Leave and Earning Statement.)

E-14 Dr. Chattha's 3/6/95 Medical Report, which Agustin had submitted to the Navy, and which shows that Agustin was "receiv[ing]" medical care or treatment, was "incapacitated" for work due to occupational "injury" (5 CFR Section 630.401(a)(1), (2)), and that his incapacitation for work would continue for 90 days or longer, or at least up to about 6/6/95.

(Note 3: Exhibits 23 to 32 were attached to Agustin's 07/26/2001, (#18, at App. C-13 or App. AA-1), "Notice of the District Court's decision resolving the jurisdiction issue…", which was **filed by leave of the Claims Court's Judge**.)

E-23 to E-31 District Court's 5-23-01 Order (or Exhibits 23-31).

E-32 U.S. Department of Labor's (or DOL) 4-13-01 letter.

(Note 4: Exhibits 33 to 40 were attached to Agustin's 07/31/2001, (#21, at App.

C-13 or App. AA-2), **Motion to amend**.)

E-34 — U.S. Department of Labor's (DOL's) 4-13-01, grant or award of Agustin's FECA compensation benefits retroactive from 2-2-95.

E-35 — Agustin's May 7, 2001 letter to Department of the Navy concerning his sick leave buy-back for the period from February 2, 1995 to April 21, 1995.

E-37 — Agustin's Notification of Personnel Action, with effective date on 04-21-95, which shows that Agustin was a 5 point veteran, permanent, full time, competitive service, career, Navy civilian federal employee. (See EE-37 below--(Formatted) Notification of Personnel Action, effective date: "04-21-95").

(Note 5: Exhibits 41-59 were attached with Agustin's 08/31/01 **Motion to amend**, #27, at App. C-14).

E-45 to E-46.1 — Agustin's (formatted) July 3, 2001 claim/letter to the IRS

E-47 — Office of Personnel Management's (OPM) May 30, 2001 letter to DOL

E-48 — OPM's May 1, 2001 letter to DOL

E-49 to E-51	Internal Revenue Service (IRS) August 3, 2001 notice/letter to Agustin
E-52 to E-57.4	Agustin's (formatted) August 8, 2001 appeal/letter to IRS
E-58 to E-59	IRS' August 27, 2001 letter to Agustin
E-60 to E-61	April 20, 1994, U.S. Department of Labor's letter to Agustin informing Agustin that "[y]our claim is accepted", "Date of Injury: December 14, 1993".
E-62	2-16-95, Application for Sick Leave. (See App. EE-62 below for the same (formatted) application for sick leave.)
E-69 to E-72	District Court's 6-8-01 Order (or exhibits 69-72), which was attached to Agustin's 10/11/2001 Reply to Defendant's opposition to Plaintiff's second motion for leave to amend his complaint, which was **filed by leave of the Claims Court's Judge** on 10/11/2001, #34, at App. AA-2 or C-15.
F-1 to F-4	AGUSTIN'S QUITE RELEVANT, OUTSTANDING MOTIONS, which include Agustin's **three (3) Motions to amend** and his quite relevant motions, in which the summary denial of all of them greatly prejudiced Agustin's prosecution of all his claims and violated his Due Process rights to be heard and to a fair and full hearing or briefing.

G-1 to G-4 Agustin's ten (10) claims—CLAIMS 1 TO CLAIMS 10

H-1 to H-6 Agustin's 07/31/2001, (#21, at App. AA-2 or App. C-13), **Motion to amend** (without exhibits App. E-33 to E-40); (see App. E-33 to E-40 above. This motion was based on quite recent development--the 4-13-01, U.S. Department of Labor (DOL) grant or award (App. E-34) of Agustin's FECA compensation benefits retroactive from February 2, 1995. See App. E-34.

I-1 to I-14 Agustin's 08/31/2001, (#27, at App. AA-2 or C-14), **Motion to amend** (without exhibits App. E-41 to E-59); (see App. E-41 to E-59 above). This motion was based on quite recent development—the Internal Revenue Service' (or "IRS") 08/27/2001 denial (App. E-58 to E-59) of Agustin's 1996 and 1997 tax refund claims.

J-1 to J-2 Excerpts with respect to the Claims Court's deprivation or violation of Agustin's First Amendment right "to petition" the Claims Court for the interpretation, relevance, and applicability of the Tucker Act and the Back Pay Act in the instant case. Quoted from Agustin's "7/11/02 Reply" or "REPLY TO: 'DEFENDANT'S RESPONSE TO NEW AUTHORITY PRESENTED BY PLAINTIFF IN SUPPORT OF HIS SICK LEAVE RIGHTS VIOLATION CLAIM", which was later filed by leave of the Claims

Court's Judge on 06/17/2003, #73, at App. C-18.

K-1 to K-7 Agustin's 02/27/2003, (#46, at App. C-16), Motion to supplement the record.

L-1 to L-6 Excerpts with respect to our U.S. Supreme Court's quite recent, *expressio unius est exclusio alterius*-case law, which is another quite controlling authority to the MSPB's lack of jurisdiction over Agustin's claims. Quoted from Agustin's 02/27/2003 "Next Wave Motion", #46, at App. C-16 and Agustin's "7/11/02 Reply", #73, at App. C-18.

M-1 to M-7 Excerpts from our U.S. Supreme Court's quite recent and quite controlling "fair interpretation" rule or "fair inference"-case law in United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132 (2003) (or "White Mountain") with respect to the Claims Court's jurisdiction over Agustin's claims. Quoted from Agustin's 03/14/2003 "White Mountain Motion", #48, at App. C-16.

N-1 to N-4 Excerpts of Agustin's Equal Protection claim (CLAIM 8) and his Due Process right to continuous federal employment (CLAIM 10). Quoted from Agustin's 03/31/2003 Next Wave Reply, #54, at App. C-17.

O-1 to O-9 Excerpts with respect to our U.S. Supreme Court's quite recent and quite controlling Takings-case law in Brown v. Legal

Foundation of Washington, 122 S.Ct. 1406 (2003), (or "Brown"); Quoted from Agustin's Brown Motion, which was filed on 03/31/2003, #55, at App. C-17.

P-1 to P-2 Our U.S. Supreme Court's governing, Federal Rules of Civil Procedure Rule 41(b)-case law. Excerpts from Costelo v. United States, 365 U.S. 265, 285-286 (1961), (or "Costelo") and from Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or "Semtek"). Quoted from Agustin's 05/06/3003 Reply, #65, at App. C-18.

Q-1 to Q-10 Agustin's 05/06/2003, (#66, at App. C-18 or App. AA-2), **Motion to amend** to include CLAIM 9 and CLAIM 10, (based on quite recent U.S. Supreme Court's case law development). This motion was based on quite recent development—our U.S. Supreme Court's constitutionally protected "speech"-case law in Virginia v. Black, 123 S.Ct. 1536, 1547, 1551 (2003) and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, [123 S.Ct. 1683, 1690 (2003) (or "Hyatt").

R-1 to R-8 Agustin's quite relevant and quite controlling, 08/25/2003, (#84, at App. C-20), Adams Motion (based on the Claims Court's quite recent 8-11-03 reannouncement of its issue preclusion or res judicata case law in Adams v. The United States, CFC No. 00-447C (August 11, 2003)); (this motion was

unjustly denied by the Claims Court in its 9-5-03 Order).

AA-1 to AA-2	Most relevant (formatted) excerpts from the Claims Court's Docket Entries
BB-1 to BB-40	Agustin's Informal Brief before the Federal Circuit
CC-1 to CC-19	Agustin's Petition for Panel Rehearing and Rehearing En Banc
EE-6	The Navy's (formatted) 2-28-95 Memorandum of Sick Leave Approval until his "sick leave account becomes exhausted". (See E-6 above).
EE-13	Excerpts from Agustin's (formatted) Leave and Earnings Statement for the two week-pay period ending 04/29/95 showing his unused and remaining, 444.8 hours of accumulated annual leave and 252.9 hours of accumulated sick leave. (See E-13 above).
EE-14	Excerpts from Dr. Chattha's (formatted) **3/6/95** medical report, which shows that Agustin's "incapacitat[ion]" (5 CFR Section 630.401(a)(1), (2)) for work would continue for 90 days or longer, or at least up to about **6/6/95**. (See App. E-14 above).

EE-32	Relevant (formatted) excerpts from U.S. Department of Labor's April 13, 2001 letter. (See E-32 above).
EE-37	Excerpts from (formatted) Notification of Personnel Action, effective date: "04-21-95". (See E-37 above).
EE-62	Agustin's (formatted) 2-16-95 application for sick leave. (See E-62 above).
SC1-1 to SC1-5	PETITIONER'S EX PARTE MOTION FOR THE COURT TO STAY OR WITHDRAW ITS MANDATE, AND TO RECONSIDER ITS DENIAL OF PETITIONER'S PETITION FOR REHEARING (which was received by the U.S. Supreme Court on April 15, 2003) in Agustin v. England, ___ U.S.___, 123 S. Ct. 903 (2003).
SC2-1 to SC2-3	Agustin's 5-28-03 letter, addressed and mailed, each to, the Chief Justice and to all the Justices of the U.S. Supreme Court in Agustin v. England, ___ U.S.___, 123 S. Ct. 903 (2003).
SC3-1	NAVY'S BRIEF BEFORE THE NINTH CIRCUIT WITH RESPECT TO THE TIMELINESS OF AGUSTIN'S 7-11-01 APPEAL in Agustin v. England, ___ U.S.___, 123 S. Ct. 903 (2003).

SC4-1	RELEVANT EXCERPTS FROM Young and Young v. United States, U.S. Court of Federal Claims No. 02-1368C (April 19, 2004), with an excellent discussion of the meaning of the term "pending" in 28 USC Section 1500
SC5-1 to 7	CHRONOLOGY OF RELEVANT EVENTS FOR THE PURPOSES OF 28 USC SECTION 1500
SC6-1	RELEVANT EXCERPTS FROM Adams v. United States U.S. Court of Federal Claims No. 00-447C (August 11, 2003)
SC7-1 to 2	MEMORANDUM opinion in Agustin v. Dalton, 37 Fed. Appx. 895 (9th Circuit (June 17, 2002))
SC8-1 to 5	PLAINTIFF'S NOTICE OF THE DISTRICT COURT'S DECISION RESOLVING THE JURISDICTION ISSUE CONCERNING PLAINTIFF'S CLAIMS UNDER 5 U.S.C. SECTION 6307 OR FECA (FEDERAL EMPLOYEES' COMPENSATION ACT) (See 07/26/2001; #18 at App. AA-1 or C-13; filed by leave of the Judge).
SC9-1 to 23	PLAINTIFF'S REPLY TO: DEFENDANT'S OPPOSITION TO

PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND HIS COMPLAINT" (wherein App. E-69 to E-72 were attached; refer to 10/11/2001, #34, at App. AA-2 or C-15).

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47-6, this disposition is not citable as precedent. It is public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

04-5010

REMIGIO I. AGUSTIN,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: March 3, 2004

Before MICHEL, LOURIE, and DYK, Circuit Judges.

PER CURIAM.

Remigio I. Agustin ("Agustin") appeals from the decision of the Court of Federal Claims dismissing his case for lack of jurisdiction and, alternatively, on the ground that the complaint failed to state a claim. Agustin v. United States, No. 00-335C (Fed. Cl. Sept. 5, 2003). Because the Court of Federal Claims properly held that it did not have jurisdiction over Agustin's case pursuant to 28 USC Section 1500, we affirm.

BACKGROUND

Agustin was employed by the Department of the Navy ("Navy") as a machinist. On December 14, 1993, he slipped in a puddle of water and fell, injuring his head, neck, and back. He returned to work on January 18, 1994, but he left work on January 20, 1994, because of pain. He never returned to work thereafter. On February 7, 1994, Agustin filed a claim for benefits with the Department of Labor, Office of Workers' Compensation Programs ("OWCP"). The OWCP granted Agustin benefits from the date of his injury, and the benefits continued until February 10, 1995, when the OWCP suspended the benefits because Agustin had failed to attend a series of medical examinations ordered by the OWCP. On February 10, 1995, and March 28, 1995, the Navy informed Agustin that it intended to remove him because he had been unavailable for duty since his injury. Agustin was informed of his right to respond to the proposed removal action, but he failed to do so. On April 12, 1995, the Navy issued a decision separating Agustin from service, effective April 21, 1995.

Agustin appealed his separation to the Merit Systems Protection Board ("Board"), alleging that the separation was invalid on a number of grounds. The Board affirmed the Navy's decision on January 9, 1996. Agustin v. Dep't. of the Navy, No. SF-0752-95-0538-I-2 (M.S.P.B. Jan. 9, 1996). Agustin also appealed his separation to the United States Equal Employment Opportunity Commission ("EEOC"), alleging that the Navy discriminated against him. In its decision of November 6, 1996, the EEOC "concur[red] with the Board's finding of no disability discrimination." Agustin v. Dep't of the Navy, No. 03960121, 1996 WL 688680, at *3 (E.E.O.C. Nov. 22, 1996).

After these decisions, Agustin filed suit in the United States District Court for the Northern District of California ("the district court") on December 18, 1996, alleging that his removal was improper and that the Navy had unlawfully discriminated against him. He sought an order reinstating him to his position with the Navy and back pay and benefits. On August 9, 1999, the district court granted the Navy's motion for summary judgment, denying any relief for Agustin. Agustin v. Dalton, No. C-96-4527 (N.D. Cal. In several subsequent orders, the district court denied Agustin's motions for reconsideration and further proceedings.

While his case was pending in the district court, Agustin filed a complaint in the Court of Federal Claims on June 6, 2000. In that case, Agustin claimed violations of several constitutional and statutory rights. Pursuant to the Back Pay Act, 5 USC Section 5596 (2000), he sought his "lost employment pay and benefits since April 21, 1995." (Appellant's App. G-1.) The government filed a motion to dismiss, arguing that the action in the Court of Federal Claims was barred by 28 USC Section 1500. On September 5, 2003, the Court of Federal Claims granted the government's motion and dismissed the case, holding that the government's "position that 28 USC Section 1500 bars the complaint filed here while the District Court action was pending appears to be correct." Agustin v. United States, No. 00-335C, slip op. at 4-5 (Fed. Cl. Sept. 5, 2003). Alternatively, the Court of Federal Claims "determined that [Agustin had] not pleaded a cause of action upon which relief could be granted" because it could not review the Navy's removal action or the subsequent decisions by the Board or the EEOC upholding the Navy's action. Id. at 5. Agustin timely filed an appeal. We have jurisdiction pursuant to 28 USC Section 1295(a)(3).

DISCUSSION

We review a dismissal by the Court of Federal Claims for lack of jurisdiction without deference. Consolidation Coal Co. v. United States, 351 F.3d 1374, 1377 (Fed. Cir. 2003). The Court of Federal Claims dismissed Agustin's case for lack of jurisdiction, citing 28 USC Section 1500, which provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 USC Section 1500 (2000).

There are two issues related to a finding of lack of jurisdiction pursuant to the statute: (1) when to make the jurisdictional determination and (2) how to determine whether the claim filed in the Court of Federal Claims is comparable to the "suit or process" pending in another court. Id. On the first issue, the Supreme Court has held that the determination of whether the statute bars jurisdiction is made at the time the claim is filed in the Court of Federal Claims. Keene Corp. v. United States, 508 U.S. 200, 209 (1993) ("[W]e read the statute as continuing to bar jurisdiction over the claim of a plaintiff who, upon filing, has an action pending in any other court 'for or in respect' to the same claims." (quoting 28 USC Section 1500)). It is beyond dispute that Agustin had a suit against the United States

pending in another court when he filed his claim in the Court of Federal Claims. Agustin's suit was filed in the Court of Federal Claims on June 6, 2000. At that time, Agustin's suit against the Navy in the district court, which was filed on December 18, 1996, was still pending, as the district court entered at least three orders thereafter, on May 23, 2001, June 8, 2001, and July 11, 2001.[1]

The second issue is "more elusive", id. at 210, but we have held that, "[f]or the Court of Federal Claims to be precluded from hearing a claim under Section 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief". Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc) (emphases in original). "That the two actions were based on different legal theories [does] not matter". Keene Corp. 508 U.S., at 212. Here, there can be no dispute that the claims arose from the same operative facts; the claims in both the district court and the Court of Federal Claims arose from the Navy's decision to remove Agustin. However, Agustin argues that the two claims are not the same because they did not seek the same relief. We disagree. Agustin requested that the district court provide the following relief:

> to order that he be reinstated to his position and that he be paid for 100% of his full pay and benefits, including accrual of his annual leave and sick leave, minus the disability retirement pay (or [Federal

---

[1] Agustin also subsequently engaged in further proceedings in the United States Court of Appeals for the Ninth Circuit, see Agustin v. Dalton, No. 01-16364 (9th Cir. June 17, 2002) (unpublished affirmance), and the Supreme Court, see Agustin v. England, 537 U.S. 1113 (2003) (denying certiorari; ___ U.S. ___, 123 S. Ct. 1778 (2003) (denying rehearing).

> Employees' Compensation Act, 5 USC Section 8101 et seq.] compensation pay) which he had received and would receive for the period from April 21, 1995 to the date of his total and complete rehabilitation, that is, the date when he starts making the same or more yearly income as he was making on April 21, 1995.

(Appellee's App. At 59-60 (emphasis in original).) In the Court of Federal Claims, Agustin also sought "lost employment pay and benefits since April 21, 1995". (Appellant's App. At G-1). Agustin thus sought the same relief from both courts: the pay and benefits he would have received from the Navy if he had not been removed on April 21, 1995.

Thus, Agustin's claims were simultaneously pending before the district court and the Court of Federal claims, and the claims in the district court and the Court of Federal Claims arose from the same operative facts and sought the same relief. Under such circumstances, 28 USC Section 1500 bars the Court of Federal Claims from taking jurisdiction over Agustin's case. To the extent that Agustin claims that section 1500 is unconstitutional, that argument is without merit. See Keene Corp., 508 U.S. at 207 (stating that "Congress has the constitutional authority to define the jurisdiction of the lower federal courts" and that "Congress has employed its power" to do so in section 1500). Accordingly, the Court of Federal Claims properly dismissed the case for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims is affirmed.

COSTS

No costs.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-335C
(Filed September 5, 2003)

REMIGIO I. AGUSTIN,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

ORDER

This civilian pay matter comes before the Court on defendant's motion to dismiss supplemented by the memorandum, filed April 2, 2003.

Plaintiff, Remigio I. Agustin, was employed as a machinist (planner and estimator) at the Alameda Naval Aviation Depot, California. On December 14, 1993, plaintiff sustained a disabling work injury by slipping in a puddle of water and falling with resulting head, neck and back injuries. Plaintiff returned to work on January 18, 1994, but left on January 20, 1994, because of pain and never returned to work thereafter. On February 7, 1994, plaintiff filed a claim for benefits with the Department of Labor, Office of Workers' Compensation Programs ("OWCP"), which was approved, retroactive to the date of injury. While absent from work, plaintiff received compensation from either the OWCP or on approved leave.

On February 10 and March 28, 1995, the Navy informed plaintiff of its intention to remove him for being unavailable for duty (for a period of 16 months) because of physical and psychiatric conditions. Also on February 10, 1995, OWCP suspended plaintiff's benefits for failure to attend a series of ordered medical examinations thus requiring plaintiff's use of 448 hours of his accrued sick leave to provide compensation during this benefit suspension period. Plaintiff was notified of his right to respond to the proposed removal action and, upon his request, was provided an extension of time for this purpose. After plaintiff's failure to respond on several scheduled dates, by an April 12, 1995, decision the Navy separated plaintiff, effective April 21, 1995, based on his unavailability for duty.

Plaintiff appealed his separation action to the Merit Systems Protection Board which by a January 9, 1996 decision affirmed the Navy's action. The Board's decision stated (in part):

> Appropriateness of penalty
>
> It is apparent that the appellant's absence from work has a nexus to the efficiency of his service with the agency. Although the appellant has had many years of Federal service, the Board has held that an employee's absence, for which no foreseeable end is in sight, constitutes a burden which no employer can efficiently endure, and thus such absence is just cause for removal. Where, as here, the appellant admits his medical conditions render him unable to return to work, and there is no indication of any specific date he could return to duty, the appellant's removal promotes the efficiency of the service.

Plaintiff also appealed his separation to the United States Equal Opportunity Commission ("EEOC"). The issue presented was whether the Navy discriminated against plaintiff when it removed him from his position based upon a charge of unavailability for duty. The EEOC decision on November 22, 1996, noted plaintiff's argument that the Navy did not accommodate him prior to removing him, because it did not allow him to use additional leave or offer him light duty work. The EEOC decision states that, "At the hearing, the deciding official testified that the agency did not offer petitioner light duty work because the medical evidence submitted did not show that he could work under any status. Moreover, the agency claimed that even though it approved all of petitioner's leave requests, the removal action was necessary given the fact that there was no indication that petitioner would be able to return to work, and it could not allow him to take leave indefinitely."

The EEOC decision concurs with the Merit Sytems Protection Board's finding that plaintiff's removal was not discriminatory. With respect to the disability issue, the EEOC decision stated:

> In the present case, the agency claims that petitioner is no longer qualified for the position, given the fact that his condition prevents him from working at all, and has completely restricted petitioner in this manner since 1993. Petitioner claims that as an accommodation, the agency should allow him to take leave until the time that he is able to return to work inasmuch as his prognosis is "good". The Commission agrees with the agency that such an accommodation is not reasonable. The medical evidence in the record does not give a date certain that petitioner would be able to return to work.

> Given the long period of time that petitioner has already been off work, the Commission finds that asking the agency to grant leave indefinitely would unduly burden its operation. Accordingly, the Commission finds that petitioner has not met the criteria of 29 CFR Section 1614.203(a) (6). As such, the Commission concurs with the Board's finding of no disability discrimination.

Following the adverse decisions by the Merit Systems Protection Board and the Equal Opportunity Commission, plaintiff filed a complaint on December 18, 1996 in the United States District Court for the Northern District of California, *Remigio I. Agustin v. Secretary, Department of the Navy*, No. C-96-4527. In his complaint, plaintiff alleged that the Navy discriminated against him on the basis of disability in violation of the Rehabilitation Act of 1973, 29 USC Section 791 *et seq*., and that the Navy retaliated against him in violation of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000 e *et seq*.. In a decision, filed August 9, 1999, the District Court granted summary judgment against plaintiff, ruling with respect to plaintiff's "accommodation" argument as follows (in part):

> Because the Court finds that the record in this case establishes that plaintiff was completely, permanently disabled, the Court need not reach the issue of whether providing plaintiff with additional sick leave would have been a reasonable accommodation. See Kennedy, 90 F.3d at 1482 ("Because [plaintiff] was totally disabled, we need not consider her contention that [defendant] could have accommodated her disability"). However, even if the Court were to consider the question of

reasonable accommodation, defendant would still be entitled to summary judgment. Although plaintiff is correct that unpaid medical leave may be a reasonable accommodation in some circumstances, see Nunes v. Walmart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999), given that plaintiff had been unavailable for work for sixteen months before his separation from employment, together with plaintiff's representations and the other evidence in the record that plaintiff was completely disabled and would be unavailable for work indefinitely, the Court finds that requiring defendant to maintain plaintiff as an employee would be unreasonable and would impose an undue hardship.

Plaintiff filed motions for reconsideration of the District Court's decision and further proceedings, including the District Court's Orders of May 23, 2001, June 8, 2001, July 11, 2001, denying reconsideration, the United States Court of Appeals decision of June 17, 2002, affirming these orders, 37 Fed. Appx. 895, and the denial of a *writ of certiorari* by the Supreme Court on January 13, 2003, 123 S. Ct. 903, demonstrates that plaintiff's District Court litigation remained pending before and after the filing of the complaint in the instant case on June 6, 2000.

In his complaint, filed in this matter, as amended, plaintiff asserts that the Navy improperly terminated his employment and that his termination, and inability to exhaust his sick leave balance amounted to an unconstitutional taking. Plaintiff seeks back pay, as well as payment for accumulated leave. During the pendency of this matter the Department of Labor reinstated plaintiff's OWCP benefits retroactive to February of 1995. Plaintiff, by motion filed July 31, 2001, sought to amend his complaint to

add his taking claim the 448 hours that his sick leave account was charged during the OWCP compensation period (February 10, 1995 [correction: February 2, 1995] until his removal on April 21, 1995). These hours would be in addition to the 252.9 hours claimed as his sick leave balance "taken" upon his removal from Navy employment. By motion, filed August 31, 2001, plaintiff also sought to add a tax refund count to his complaint based upon his having paid federal income tax on the compensation he received for the 448 sick leave hours charged to his sick leave account. Defendant opposed these amendment sought by plaintiff.

Defendant's dismissal motion is primarily premised upon 28 USC Section 1500. It is asserted that plaintiff's District Court litigation claims arise from the same operational facts as the claims asserted in the complaint filed in this Court. It is true that the claims in both cases arise from the Navy's decision to remove plaintiff because of his unavailability for work due to his disability. Plaintiff's sick leave claim in this Court was also asserted, in essence, in the context of the "accommodation" claim pressed in District court. As such, defendant's position that 28 USC Section 1500 bars the complaint filed here while the District Court action was pending appears to be correct. *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Johns-Mansville Corp. v. United States*, 855 F.2d 1556, 1567 (Fed. Cir. 1988), cert. denied, 489 U.S.1066 (1989).

However, were it concluded that 28 USC Section 1500 does not bar plaintiff's complaint, then it is determined that plaintiff has not pleaded a cause of action upon which relief could be granted. The Court of Federal Claims does not have jurisdiction to rule on the validity of the Navy's action in removing plaintiff from his employment. *United States v. Fausto*, 484 U.S. 439 (1987). This Court has no

jurisdiction to review decisions of the Merit Systems Protection Board or the Equal Employment Opportunity Commission. See USC Sections 7511-7514, 7703; *Williams v. Department of the Army*, 715 F.2d 1485 (Fed. Cir. 1983). Given the adverse decisions of those administrative tribunals and the District court's granting of summary judgment in favor of the Navy, it must be concluded that the validity of the Navy's removal action is beyond question in this litigation. Since plaintiff was properly removed from Navy employment, he has no property right to any monetary sum, based on his sick leave balance, which could be "taken". Had his removal been held invalid, plaintiff could, perhaps, have based a monetary claim on any difference, if any, between OWCP compensation and sick leave. *Everett v. United States*, 169 Ct. Cl. 11, 20, 340 F.2d. 352, 357 (1965). The Court of Federal Claims would, however, lack jurisdiction to resolve any such claim. *Pueschel v. United States*, 297 F.3d 1371 (Fed. Cir. 2002). Otherwise, while a sick leave balance upon termination may count for retirement annuity computation purposes, 5 USC Section 8339(m), there is no entitlement to a lump sum payment. *Martilla v. United States*, 118 Ct. Cl. 177, 182 (1950); *True v. Office of Personnel Management*, 926 F.2d 1151, 1155 (1991); *Carman v. United States*, 221 Ct. Cl. 165, 168, 602 F.2d 946, 948 (1979).

In these circumstances, as plaintiff had no property right to a monetary sum based on his sick leave balance at removal, no "taking" is possible. Plaintiff's claims, such as for back pay, all depend upon invalidating his removal from Navy employment which this Court lacks jurisdiction to consider.

Accordingly, it is **ORDERED** that:

(1) Plaintiff's motions to amend his complaint to add 448 sick leave hours and a refund tax claim shall be **DENIED**;

(2) All other non-dispositive motions by the parties shall be **DENIED**;

(3) Defendant's Motion to Dismiss shall be **GRANTED** and plaintiff's complaint, as amended, shall be **DISMISSED**.

/s/ James F. Merow
James F. Merow
Senior Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-335C

REMIGIO I. AGUSTIN,

v.

JUDGMENT
FILED SEP-8-2003

THE UNITED STATES

Pursuant to the court's Order, filed September 5, 2003,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Brian Bishop
Acting Clerk of the Court

September 8, 2003

By: /s/ [could not read]
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 26, 2004.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: April 1, 2004

Filed: April 1, 2004

cc: Remigio L. Agustin
David A. Harrington
AGUSTIN V. US, 04-5010
(CFC – 00-CV-335)

Amendments to the Constitution of the United States:

Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article IV, Section 1:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Federal Rules of Civil Procedure (FRCP) Rule 41(b):

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Federal Rules of Civil Procedure, Rule 41(b).

Rules Enabling Act, (28 USC Section 2072(b)):

"(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rules Enabling Act, (28 U. S. C. §2072(b)).

28 USC Section 1500:

"The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." 28 USC Section 1500.

28 USC Section 1406(a):

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 USC Section 1406(a).

28 USC Section 1631:

"Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred." 28 USC Section 1631.

28 USC Section 1491(a)(1):

"(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 USC Section 1491(a)(1).

28 USC Section 1346(a)(2):

"(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:...(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978." 28 USC Section 1346(a)(2).

5 USC Section 5596(b)(1)(A)(i):

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee –

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect –

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable

which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period". 5 USC Section 559 (b)(1)(A)(i).

65 Statute 681, Section 204(a), (b):

"(a) Officers and employees to whom this title applies shall be entitled to sick leave with pay…(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, shall accumulate and be available for use in succeeding years." 65 Statute 681, Section 204(a), (b).

5 USC Section 6307(a), (b):

"(a) An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period, except that sick leave with pay accrues to a member of the Firefighting Division of the Fire Department of the District of Columbia on the basis of two-fifths of a day for each full biweekly pay period.

(b) Sick leave provided by this section, which is not used by an employee, accumulates for use in succeeding years." 5 USC Section 6307(a), (b).

(5 USC Section 6307's implementing federal regulations, 5 CFR Section 630.401(a)(1), (2), states that:

"(a) Subject to paragraphs (b) through (f) of this section, an agency must grant sick leave to an employee when the employee--

(1) Receives medical, dental, or optical examination or treatment;

(2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth". 5 CFR Section 630.401(a)(1), (2).)

5 USC Section 8118(c):

"(c) An employee may use annual or sick leave to his credit at the time the disability begins". 5 USC Section 8118(c).

(20 CFR Section 10.310(a) (1995):

"An employee who sustains a job-related disability may use sick or annual leave or both to avoid interruption of income". 20 CFR Section 10.310(a) (1995).)

CLOSED, APPEAL

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:00-cv-00335-JFM
Internal Use Only

AGUSTIN v. USA
Assigned to: Sr. Judge James F. Merow
Referred to:
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1491 Tucker Act

Date Filed: 06/06/00
Jury Demand:
Nature of Suit: 312 Civilian Pay - Other
Jurisdiction: U.S. Government Defendant

Plaintiff

REMIGIO I. AGUSTIN

represented by **REMIGIO I. AGUSTIN**
169 Austin Avenue
Hayward, CA 94544
PRO SE

V.

Defendant

USA

represented by **David Allen Harrington**
U. S. Department of Justice
Civil Div. - Commercial litigation Br.
1100 L Street, NW
8th Floor
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202-307-0277
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LEAD ATTORNEY

Jan Marie Folena
(C) U. S. Department of Justice
Civil Div. - Commercial litigation Br.
1100 L Street, NW
8th Floor
Washington, DC 20530
TERMINATED: 04/25/2002
LEAD ATTORNEY

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Filing Date	#	Docket Text
06/06/2000	1	COMPLAINT, FILING FEE $120. RECEIPT #049764. Answer due on 8/7/00. (FE) (Entered: 06/08/2000)
06/06/2000		CASE assigned to Judge Unassigned. (FE) (Entered: 06/08/2000)
06/06/2000	2	Notice of assignment to Sr. Judge James F. Merow. Copy to parties. (FE) (Entered: 06/08/2000)
06/13/2000	3	ORDER re: On June 9, 2000, the Clerk's Office received plaintiff's "Additional Pleading in Support of Claims for Back Pay and for Unconstitutional Taking of Accumulated Sick Leave", this document shall be filed by leave of the Court (signed by Sr. Judge James F. Merow). Copy to parties. (FE) (Entered: 06/14/2000)
06/13/2000	4	AMENDED COMPLAINT by REMIGIO I. AGUSTIN (Answer due 6/26/00) amending [1-1] complaint, by leave of the Judge. Service: 6/13/00. [five copies served on defendant] (FE) (Entered: 06/14/2000)
06/13/2000		Deadline updated; set Answer deadline to 8/7/00 (AB) (Entered: 08/02/2000)
06/26/2000	5	NOTICE of Attorney Appearance for USA by Jan Marie Folena Service: 6/26/00. (FE) (Entered: 06/28/2000)
08/01/2000	6	MOTION by USA (Service: 8/1/00) to Extend Time to respond to the complaint , (until October 6, 2000). (FE) (Entered: 08/03/2000)
08/07/2000	7	ORDER granting [6-1] motion to Extend Time to respond to the complaint Answer deadline to 10/6/00 (signed by Sr. Judge James F. Merow). Copy to parties. (FE) (Entered: 08/08/2000)
10/05/2000	8	MOTION by USA (Service : 10/4/00) to Extend Time to respond to the complaint [until October 20, 2000]. Response due: 10/23/00 (JT) (Entered: 10/11/2000)
10/10/2000	9	ORDER granting [8-1] motion to Extend Time to respond to the complaint reset Answer deadline to 10/20/00 (signed by Sr. Judge James F. Merow) Copy to parties. (DS) (Entered: 10/13/2000)
10/20/2000	10	MOTION by USA (Service : 10/20/00) to Dismiss . Response due: 11/20/00. (HW) (Entered: 10/23/2000)
10/31/2000	11	MOTION by REMIGIO I. AGUSTIN (Service : 10/26/00) for Leave to

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		File a response to Defendant's motion to dismiss. Response due: 11/13/00 (JT) (Entered: 11/02/2000)
11/08/2000	12	MOTION by USA (Service : 11/8/00) to Extend Time to respond to Plaintiff's motion for leave to file a response and response to Defendant's motion to dismiss [until November 22, 2000]. Response due: 11/27/00 (JT) (Entered: 11/11/2000)
11/13/2000	16	ORDER granting [12-1] motion to Extend Time to respond to Plaintiff's motion for leave to file a response and response to Defendant's motion to dismiss Reply to Response to Motion reset to 11/22/00 for [10-1] motion to Dismiss (signed by Sr. Judge James F. Merow) Copy to parties. (DS) (Entered: 12/06/2000)
11/27/2000	13	MOTION by USA (Service : 11/27/00) for Leave to File reply brief out of time. Response due: 12/14/00 (JT) (Entered: 11/29/2000)
11/28/2000	14	ORDER granting [13-1] motion for Leave to File reply brief out of time (signed by Sr. Judge James F. Merow). Copy to parties. (FE) (Entered: 11/29/2000)
11/28/2000	15	RESPONSE by USA (Service: 11/27/00) to [11-1] motion for Leave to File a response to Defendant's motion to dismiss. Reply due: 12/11/00 (JT) (Entered: 11/30/2000)
07/26/2001	17	ORDER directing the Clerk's Office to file Plaintiff's Notice and Defendant's response to the Notice is due on 8/17/01 (signed by Sr. Judge James F. Merow). Copy to parties. (LTD) (Entered: 07/26/2001)
07/26/2001	18	NOTICE of District Court's 5/23/01 order resolving the jurisdiction issue concerning Plaintiff's claims by REMIGIO I. AGUSTIN. Filed by leave of the Judge. Service: 7/23/01. (LTD) (Entered: 07/26/2001)
07/26/2001	19	ORDER directing Clerk's Office to file Plaintiff's Notice of the District Court's Decision resolving the Juriadiction issue concerning Plaintiff's claims and Defendant may respond to the notice by 8/17/01 (signed by Sr. Judge James F. Merow). Copy to parties. (LTD) (Entered: 07/26/2001)
07/26/2001	20	NOTICE of the District Court's decision resolving the jurisdiction issue concerning Plaintiff's Claims under FECA by REMIGIO I. AGUSTIN. Filed by leave of the Judge. Service: 7/20/01. (LTD) (Entered: 07/26/2001)
07/31/2001	21	MOTION by REMIGIO I. AGUSTIN (Service: 7/27/01) to Amend [4-1] amended complaint . Response due: 8/13/01. (LTD) (Entered: 08/01/2001)

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08/10/2001	22	MOTION by USA (Service: 8/10/01) to Extend Time to respond to Motion to Amend the complaint until 9/5/01. Response due: 8/27/01. (LTD) (Entered: 08/13/2001)
08/14/2001	23	ORDER granting [22-1] motion to Extend Time to respond to Motion to Amend the complaint Response to [21-1] motion to Amend [4-1] amended complaint reset to 9/5/01 (signed by Sr. Judge James F. Merow). Copy to parties. (FE) (Entered: 08/15/2001)
08/17/2001	24	MOTION by USA (Service: 8/17/01) to Extend Time to respond to plaintiff's notices of the district court's May 23, 2001 order (to September 14, 2001). (DS) (Entered: 08/20/2001)
08/20/2001	25	ORDER granting [24-1] motion to Extend Time to respond to plaintiff's notices of the district court's May 23, 2001 order by 9/14/01 (signed by Sr. Judge James F. Merow). Copy to parties. (FE) (Entered: 08/21/2001)
08/30/2001	26	RESPONSE by USA (Service: 8/30/01) to [21-1] motion to Amend [4-1] amended complaint. Reply due: 9/17/01. (HW) (Entered: 08/31/2001)
08/31/2001	27	MOTION by REMIGIO I. AGUSTIN (Service : 8/30/01) for Leave to amend his complaint, etc. Response due: 9/17/01 (HW) (Entered: 09/04/2001)
09/06/2001	28	REPLY by REMIGIO I. AGUSTIN to response to [27-1] motion for Leave to amend his complaint, etc. Service: 9/5/01. (LTD) (Entered: 09/07/2001)
09/17/2001	29	RESPONSE by USA to [19-1] relief directing Clerk's Office to file Plaintiff's Notice of the District Court's Decision resolving the Jurisdiction issue concerning Plaintiff's claims and Defendant may respond to the notice by 8/17/01. Service: 9/14/01. (LTD) (Entered: 09/19/2001)
09/17/2001	30	MOTION by USA (Service: 9/17/01) to Extend Time to respond to second motion to amend complaint , (until October 1, 2001). Response due: 10/4/01. (FE) (Entered: 09/19/2001)
09/19/2001	31	ORDER granting [30-1] motion to Extend Time to respond to second motion to amend complaint Response to [27-1] motion for Leave to amend his complaint, etc. reset to 10/1/01 (signed by Sr. Judge James F. Merow). Copy to parties. (FE) (Entered: 09/20/2001)
09/27/2001	32	REPLY by REMIGIO I. AGUSTIN to [29-1] response by USA, by leave of the Judge. Service: 9/24/01. (FE) (Entered: 09/27/2001)
10/01/2001	33	RESPONSE by USA (Service: 10/1/01) to [27-1] motion for Leave to

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		amend his complaint, etc. . Reply due: 10/15/01. (FE) (Entered: 10/02/2001)
10/11/2001	34	REPLY by REMIGIO I. AGUSTIN to response to [27-1] motion for Leave to amend his complaint, etc. Filed by leave of the Judge. Service: 10/9/01 (LTD) (Entered: 10/12/2001)
04/03/2002	35	MOTION by REMIGIO I. AGUSTIN (Service: 3/29/02) for Leave to present new and recent U.S. Supreme COurt's decision in support of his statutory sick leave rights violation claim . Response due: 4/15/02. (LTD) (Entered: 04/04/2002)
04/05/2002	36	ORDER granting [35-1] motion for Leave to present new and recent U.S. Supreme Court's decision in support of his statutory sick leave rights violation claim Defendant's response, not to exceed 10 pages, due 4/23/02 (signed by Sr. Judge F. Merow). Copy to parties. (LTD) (Entered: 04/08/2002)
04/23/2002	37	RESPONSE by USA (Service: 4/23/02) to [35-1] motion for Leave to present new and recent U.S. Supreme Court's decision in support of his statutory sick leave rights violation claim. Reply due: 5/7/02. (LTD) (Entered: 04/24/2002)
04/23/2002	38	MOTION by REMIGIO I. AGUSTIN (Service: 4/17/02) for Leave to file the instant document to present new, recent and relevant U.S. Supreme court's decisions, etc. . Response due: 5/6/02. (LTD) (Entered: 04/24/2002)
04/25/2002	39	NOTICE of Attorney Appearance for USA by David Allen Harrington. Service: 4/25/02. (LTD) (Entered: 04/26/2002)
04/25/2002		**Terminated attorney Jan Marie Folena for USA. (LTD) (Entered: 04/26/2002)
04/29/2002		**Terminated deadlines (HW) (Entered: 04/29/2002)
04/29/2002	40	REPLY by REMIGIO I. AGUSTIN to response to [35-1] motion for Leave to present new and recent U.S. Supreme COurt's decision in support of his statutory sick leave rights violation claim. Service: 4/26/02. (HW) (Entered: 04/29/2002)
04/29/2002	41	ORDER granting [38-1] motion for Leave to file the instant document to present new, recent and relevant U.S. Supreme court's decisions, etc. Defendant's response, not to exceed 10 pages, to motion for leave to file instant document to present new, recent, etc. due 5/16/02 (signed by Sr. Judge James F. Merow). Copy to parties. (LTD) (Entered: 04/29/2002)
05/06/2002	42	MOTION by REMIGIO I. AGUSTIN (Service: 5/3/02) to Stay

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		Proceedings , (until July 26, 2002). Response due: 5/20/02. (FE) (Entered: 05/07/2002)
05/15/2002	43	RESPONSE by USA to new authority presented by plaintiff in support of his sick leave rights violation claim. Service: 5/15/02. (FE) (Entered: 05/16/2002)
05/22/2002	44	MOTION by USA (Service: 5/22/02) to Extend Time to file and serve response to motion to stay , (until May 22, 2002). Response due: 6/10/02. (FE) (Entered: 05/23/2002)
05/29/2002	45	ORDER granting [44-1] motion to Extend Time to file and serve response to motion to stay (signed by Sr. Judge James F. Merow). Copy to parties. (LTD) (Entered: 05/30/2002)
07/09/2002		**Terminated deadlines (JT) (Entered: 07/09/2002)
01/08/2003		**Terminated document (JT) (Entered: 01/08/2003)
02/27/2003	46	MOTION by REMIGIO I. AGUSTIN (Service: 2/22/03) to supplement the record in the instant case based on the U.S. Supreme Court's recent reannouncement, etc. . Response due: 3/11/03. (LTD) (Entered: 03/05/2003)
03/05/2003	47	MOTION by USA (Service: 3/5/03) to Extend Time to respond to the motion to supplement the record until 3/24/03. Response due: 3/24/03. (LTD) (Entered: 03/07/2003)
03/14/2003	48	MOTION for the Court to take judicial notice of U.S. Supreme Court's (1) reannouncement of its Tucker Act Jurisdiction-case law and (2) its announcement of its new "fair interpretation" rule or "fair inference" case-law in United States c. White Mountain Apache Tribe, U.S. No. 01-1067 (3-4-03) by REMIGIO I. AGUSTIN. Service: 3/11/03. Response due by 3/28/2003. (lrd) Modified on 3/26/2003 (dls,). (Entered: 03/17/2003)
03/17/2003	49	ORDER granting [47] Motion for Extension of Time to respond to the motion to supplement the record. Response to motion to supplement the record due 3/24/2003. Signed by Judge James F. Merow. (lrd) (Entered: 03/19/2003)
03/24/2003	50	RESPONSE to Motion re [46] Motion for Miscellaneous Relief filed by The United States. Reply due by 4/7/2003. Service: 3/24/03.(dw1,) (Entered: 03/26/2003)
03/25/2003	51	RESPONSE to Motion re [48] MOTION filed by The United States. Reply due by 4/7/2003. Service: 3/25/03.(dw1,) (Entered: 03/27/2003)

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03/28/2003	52	MOTION for Leave to File supplemental memorandum in support of its motion to dismiss by The United States. Service: 3/28/03. Response due 4/14/2003. (lrd) (Entered: 04/03/2003)
03/31/2003	53	REPLY to Response to Motion re [48] MOTION filed by REMIGIO I. AGUSTIN. Service: 3/29/03.(dw1,) (Entered: 04/04/2003)
03/31/2003	54	REPLY to Response to Motion re [46] Motion for Miscellaneous Relief filed by REMIGIO I. AGUSTIN. Service: 3/29/03.(dw1,) (Entered: 04/04/2003)
03/31/2003	55	MOTION to take judicial notice of our U.S. Supreme Court's reannouncement of it's fifth amendment's just compensation clause-case law, etc. by REMIGIO I. AGUSTIN. Service: 3/27/03. Response due by 4/14/2003. (dw1,) (Entered: 04/04/2003)
04/02/2003	56	ORDER granting [52] Motion for Leave to File supplemental memorandum. Signed by Judge James F. Merow. (lrd) (Entered: 04/10/2003)
04/02/2003	57	SUPPLEMENTAL MEMORANDUM in support of Defendant's Motion to Dismiss. (lrd) (Entered: 04/10/2003)
04/09/2003	58	MOTION for Leave to file supplemental pleading in response to Defendant's supplemental memorandum in support of the Motion to Dismiss, by REMIGIO I. GUSTIN. Service: 4/7/03. Response due 4/28/2003. (lrd) (Entered: 04/15/2003)
04/14/2003	59	RESPONSE to [48] MOTION to take "judicial notice", filed by The United States.Reply due 4/28/2003. Service: 4/14/03. (lrd) (Entered: 04/21/2003)
04/21/2003	60	MOTION to Strike [57] Supplemental Brief by The United States.Service: 4/21/03. Response due by 5/8/2003. (dw1,) (Entered: 04/25/2003)
04/22/2003	61	REPLY to Response re [48] MOTION filed by REMIGIO I. AGUSTIN. Service: 4/18/03.(hw1,) (Entered: 04/29/2003)
04/28/2003	62	RESPONSE to Motion re [60] MOTION to Strike [57] Supplemental Brief filed by REMIGIO I. AGUSTIN. Reply due by 5/9/2003. Service: 4/26/03.(dw1,) (Entered: 04/30/2003)
04/28/2003	63	RESPONSE to [58] MOTION for Leave to File for leave to file supplemental pleading in response to Defendant's supplemental memorandum in support of the Motion to Dismiss filed by The United States. Reply due by 5/12/2003. Service: 4/28/03.(dls,) (Entered: 05/02/2003)

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05/06/2003	64	MOTION for this court to issue a decision on or before July 3, 2003 re [27] Motion for Leave to amend the complaint by REMIGIO I. AGUSTIN.Service: 5/2/03. Response due by 5/19/2003. (dw1,) (Entered: 05/09/2003)
05/06/2003	65	REPLY to Response to Motion re [58] MOTION for Leave to File for leave to file supplemental pleading in response to Defendant's supplemental memorandum in support of the Motion to Dismiss filed by REMIGIO I. AGUSTIN. Service: 5/2/03.(dw1,) (Entered: 05/09/2003)
05/06/2003	66	MOTION to Amend Pleadings - Rule 15(b) [1] Complaint by REMIGIO I. AGUSTIN.Service: 4/29/03. Response due by 5/16/2003. (dw1,) (Entered: 05/12/2003)
05/13/2003	67	REPLY to Response to Motion re [60] MOTION to Strike [57] Supplemental Brief filed by The United States, by leave of the Judge. Service: 5/9/03.(dw1,) (Entered: 05/15/2003)
05/14/2003	68	RESPONSE re [66] MOTION to Amend Pleadings - Rule 15(b) [1] Complaint filed by UNITED STATES. Reply due by 5/27/2003. Service: 5/14/03.(hw1,) (Entered: 05/22/2003)
05/15/2003	69	RESPONSE to Motion re [64] MOTION for this court to issue a decision on or before July 3, 2003 re [27] Motion for Leave to File filed by UNITED STATES. Reply due by 5/30/2003. Service: 5/15/03.(vro,) (Entered: 05/22/2003)
06/02/2003	70	MOTION for Order to Show Cause why sanctions and/or penalties would not be appropriate by REMIGIO I. AGUSTIN.Service: 5/28/03. Response due by 6/16/2003 (jat,) (Entered: 06/11/2003)
06/17/2003	71	RESPONSE to "Defendant's motion for enlargement of time" filed by UNITED STATES, file by leave of the Judge. Service: 6/3/03.(hw1,) (Entered: 06/20/2003)
06/17/2003	72	REPLY to Response to Motion re [66] MOTION to Amend Pleadings - Rule 15(b) [1] Complaint filed by REMIGIO I. AGUSTIN, by leave of the Judge. Service: 5/20/03.(dw1,) (Entered: 06/20/2003)
06/17/2003	73	Reply to Defendant's Response to New Authority presented by plaintiff in support of his sick leave rights violation claim by REMIGIO I. AGUSTIN, by leave of the Judge. Service: 7/11/02.(dw1,) (Entered: 06/20/2003)
06/17/2003	74	MOTION for Extension of Time to File Response to [70] MOTION for Order to Show Cause, (until June 26, 2003), by UNITED STATES, by leave of the Judge.Service: 5/29/03. Response due by 6/16/2003. (dw1,) (Entered: 06/20/2003)

06/19/2003	75	ORDER granting [74] Motion for Extension of Time to File Response to [70] MOTION for Order to Show Cause why sanctions and/or penalties would not be appropriate. Response due by 6/26/2003. Signed by Senior Judge James F. Merow. (dw1,) (Entered: 06/20/2003)
06/25/2003	76	RESPONSE to [70] Plaintiff's MOTION for Order to Show Cause filed by UNITED STATES. Reply due by 7/10/2003. Service: 6/25/03.(jcp,) (Entered: 06/26/2003)
06/27/2003	77	ORDER denying [70] Pltf's Motion for Order to Show Cause, filed 6/2/03. Signed by Judge James F. Merow. (jcp,) (Entered: 07/01/2003)
07/08/2003	78	EX PARTE MOTION for This Court to Take Judicial Notice of Our US Supreme Court's Reannouncment of its "Where...the Words of the Statute are Unambiguous...'Judicial Inquiry is Complete'" - Case Law in Desert Palace, Inc. v. Costa, US No. 02-679 (June 9, 2003), 539 US (2003) by REMIGIO I. AGUSTIN.Service: 7/2/03. Response due by 7/21/2003.(jcp,) (Entered: 07/09/2003)
07/10/2003	79	ORDER RETURNING: That Pltf's Reply to: "Dft's Response to Pltf's Motion for an Order to Show Cause" received 7/8/03 is MOOT and shall be returned UNFILED to pltf. Signed by Judge James F. Merow. (jcp,) (Entered: 07/11/2003)
07/16/2003	80	MOTION for Extension of Time to File Response to [78] MOTION,until 8/4/03, filed by UNITED STATES.Service: 7/16/03. (dls,) (Entered: 07/21/2003)
07/23/2003	81	ORDER granting [80] Dft's Motion for Extension of Time to File Response as to [78] Pltf's MOTION Requesting That the Court Take Judicial Notice of Desert Palace v. Costa, until 8/4/03. Response due by 8/4/2003 Signed by Judge James F. Merow. (jcp,) (Entered: 07/23/2003)
08/04/2003	82	RESPONSE to [78] Pltf's Sixth MOTION to Submit New Authority filed by USA. (Together with Cross-Motion to Strike) Reply due by 8/18/2003. Service: 8/4/03.(jcp,) (Entered: 08/06/2003)
08/04/2003	82	CROSS MOTION to Strike [78] Pltf's Sixth Motion to Submit New Authority by USA. (Together with Response to Pltf's Sixth Motion to Submit New Authority)Service: 8/4/03. Response due by 8/21/2003. (jcp,) (Entered: 08/06/2003)
08/12/2003	83	REPLY to: "Dft's Response to Pltf's Sixth Motion to Submit New Authority and [82] Dft's CROSS MOTION to Strike [78] Pltf's Sixth Motion to Submit New Authority" filed by REMIGIO I. AGUSTIN. Service: 8/11/03.(jcp,) (Entered: 08/13/2003)

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08/25/2003	84	EX PARTE MOTION for This Court to Take Judicial Notice of This Court's Most Recent Collateral Estoppel, or Issue Preclusion, or Res Judicata-Case Law in Adams v. The United States, CFC 00-447C (August 11, 2003) by REMIGIO I. AGUSTIN.Service: 8/21/03. Response due by 9/8/2003.(jcp,) (Entered: 08/26/2003)
09/05/2003	85	UNPUBLISHED ORDER and OPINION on [55] MOTION to take judicial notice of our U.S. Supreme Court's reannouncement of it's fifth amendment's just compensation clause-case law, etc. filed by REMIGIO I. AGUSTIN, [82] CROSS MOTION to [78] Motion for Miscellaneous Relief, filed by REMIGIO I. AGUSTIN filed by USA, [58] MOTION for Leave to File for leave to file supplemental pleading in response to Defendant's supplemental memorandum in support of the Motion to Dismiss filed by REMIGIO I. AGUSTIN, [84] MOTION for This Court to Take Judicial Notice of This Court's Most Recent Collateral Estoppel, or Issue Preclusion, or Res Judicata-Case Law in Adams v. The United States, CFC 00-447C (August 11, 2003) filed by REMIGIO I. AGUSTIN, [60] MOTION to Strike [57] Supplemental Brief filed by USA, [11] Motion for Leave to File filed by REMIGIO I. AGUSTIN, [21] Motion to Amend/Correct filed by REMIGIO I. AGUSTIN, [27] Motion for Leave to File filed by REMIGIO I. AGUSTIN, [48] MOTION filed by REMIGIO I. AGUSTIN, [64] MOTION for this court to issue a decision on or before July 3, 2003 re [27] Motion for Leave to File filed by REMIGIO I. AGUSTIN, [46] Motion for Miscellaneous Relief filed by REMIGIO I. AGUSTIN, [78] MOTION filed by REMIGIO I. AGUSTIN, [66] MOTION to Amend Pleadings - Rule 15(b) [1] Complaint filed by REMIGIO I. AGUSTIN, [10] Motion to Dismiss filed by USA. The Clerk is directed to enter judgment dismissing the complaint as amended. Signed by Judge James F. Merow. (lld,) (Entered: 09/08/2003)
09/08/2003	86	JUDGMENT entered, pursuant to Rule 58, that the complaint is dismissed. (lld,) (Entered: 09/08/2003)
09/08/2003		***Civil Case Terminated. (lld,) (Entered: 09/08/2003)
09/10/2003		Deficiency Memorandum: Dft's Motion for Enlargement of Time, received on 9/8/03 is returned to the party as the Case is closed, per Judge Williams. (jcp,) (Entered: 09/15/2003)
09/30/2003	87	NOTICE OF APPEAL by REMIGIO I. AGUSTIN. Filing fee $ 105, receipt number 058856. Copies to judge, opposing party and CAFC. (hw1,) (Entered: 10/01/2003)
10/16/2003	88	CAFC Case Number 04-5010 for [87] Notice of Appeal filed by REMIGIO I. AGUSTIN. (hw1,) (Entered: 10/17/2003)

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HISTORICAL BACKGROUND AND SET OF FACTS

The following facts are undisputed and indisputable by the Defendant (or "Navy").

From 9-13-68 to 4-21-95, Agustin, a U.S. citizen and a Vietnam U.S. veteran, was a permanent or career, full time, competitive service, civilian federal employee. (See App. E-37/EE-37, which was attached to Agustin's 07/31/2001 Motion to Amend, which was filed on 07/31/2001, Docket Entry No. 21 at App. AA-2). He has an honorable, dedicated, and outstanding more than 26 years of federal service in time of war and in peace, as a Vietnam U.S. veteran and as a federal employee; he was recognized and awarded with eight or nine consecutive SUSTAINED SUPERIOR PERFORMANCE (SSP) AWARDS up to 1993 (the year of his unfortunate work accident), and he had excellent attendance records and had been recognized and awarded five consecutive "ZERO SICK LEAVE" USAGE AWARDS from 1985 to 1990, by his employing federal agency.

On 12-14-93, Agustin sustained an on-the-job occupational injury as a U.S. Navy civilian, career, full time, federal employee. He timely filed a Federal Employees' Compensation Act (FECA) claim under our **no-fault** system of federal workers' compensation.

Prior to Agustin's 12-14-93 on-the-job injury, Agustin has never filed a grievance, nor an Equal Employment Opportunity (EEO) discrimination complaint, nor a FECA disability claim.

From 12-14-93 to 4-21-95 (the effective date of the Navy's 4-12-95 personnel action): (1) Agustin has no unapproved absence or no absence without leave

(AWOL), all his absence or "unavailability for duty" (App. E-4) was all authorized or approved absence, was all authorized or approved by, and was all with the blessing of, the federal government; and (2) Agustin obeyed the laws, and all his authorized or approved absence was for the enjoyment or exercise of his statutory and regulatory rights pursuant to our money-mandating statutes and regulations: (a) his Federal Employees' Compensation Act (FECA) continuation of pay rights from 12-15-93 to 1-31-94, (b) his FECA compensation rights from 2-1-94 to 1-22-95, and (c) his 65 Statute 681, Section 204 and 5 CFR Section 630.401(a)(1), (2) rights from 1-23-95 to 4-21-95. From 12-15-93 to 4-21-95, Agustin's "unavailability for duty" (App. E-4) was all "constitutionally protected conduct" (Arnett v. Kennedy, 416 U.S. 134, 163 (1974))—(a) Agustin exercised his statutory and regulatory rights as a federal employee pursuant to our money-mandating statutes, and (b) Agustin exercised his fundamental and substantive Due Process rights or liberty interests to enjoy such statutory and regulatory rights. See App. Q-5.

In January 1994 and in March 1994, as a second level, supervisory production manager (Machinist Supervisor II, WS-3414-15), **Agustin filed EEO racial discrimination complaints against his employing federal agency** and he reported and exposed his employing federal agency's racially-biased practice of tolerating or ignoring unsafe, production work conditions for very long years against minority employees based on race.

On April 20, 1994, Agustin's 12-14-93 on-the-job injury was accepted and approved by the federal government as occupational injury under the Federal Employees' Compensation Act (FECA). See App. E-60 to E-61.

In June 1994, Agustin received a demotion personnel action, not to any available and numerous first level supervisory positions (such as Foreman or first level supervisor in his employing agency, which he was qualified with his then more than 12 years of supervisory experience and with his educational qualification--a Bachelor of Science Degree in Production and Operations Management), but **all the way down from a second level supervisory position (Machinist Supervisor II, WS-3414-15) to a non-supervisory position** (Planner and Estimator (P&E), WD-3414-08), (a position the agency has no need to fill (and which the agency had admitted it did not fill after Agustin's removal) (see App. E-2 to E-3), and a position which is undisputed by the Navy and which Agustin had declared under penalty of perjury that he has never occupied before in his entire federal career prior to January 13, 1995), under the pretext of a Reduction In Force.

On 1-13-95, Agustin's demotion to the non-supervisory P&E position became effective.

On 2-16-95, Agustin provided administratively acceptable evidence and submitted to the Navy his application to enjoy or exercise his statutory and regulatory "'right[s] to...use'" (Philips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998)) "sick leave due to [his FECA approved] occupational injury" (App. E-62)--and he had triggered the Navy's 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995) legal duties and obligations, as well as its constitutional duties and obligations, including its constitutional duty to allow Agustin to enjoy or exercise his fundamental and substantive Due Process right or liberty

interest to medical care or treatment (see App. K-3 to K-4). See App. E-62.

On 2-28-95, the Navy "approved" his (2-16-95) application for sick leave benefits until his annual leave and sick leave accounts "become[] exhausted" (exhibit 6). See exhibit 6 or App. E-6. Since the Navy's statutory, regulatory, and constitutional duties and obligations had been triggered, since Agustin has provided administratively acceptable evidence, since he was "receiv[ing]...medical...treatment...[wa]s incapacitated for the performance of duties by physical or mental...injury" (5 CFR Section 630.401(a)(1), (2) (1-1-03)), and since his sick leave request was "due to [his FECA approved] occupational injury" (App. E-62), pursuant to the clear, plain, and unambiguous command of 5 CFR Section 630.401(a)(1), (2), the Navy has no discretion nor authority to deny Agustin's sick leave request until his annual and sick leave accounts "become[] exhausted" (App. E-6). (5 CFR Section 630.401(a)(1), (2) (1-1-03) explicitly and unambiguously commands that: "[A]n agency **must grant sick leave** to an employee when the employee--(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth", (bold and underline added). 5 CFR Section 630.401(a)(1), (2) (1-1-03)).

Prior to 4-12-95, Agustin has provided Dr. Chattha's 3/6/95 medical report (App. E-14) to his employing federal agency, which has clearly established that Agustin was in great and urgent need to "receive[]...medical...treatment...[wa]s incapacitated for the performance of duties by physical or mental...injury" (5 CFR Section 630.401(a)(1), (2) (1-1-03)) and that his

incapacitation for work would continue for 90 days or longer, or at least up to about 6/6/95. See App. E-14.

Dr. Chattha's 3/6/95 medical report (App. E-14), showed the following quite relevant, clear and convincing evidence with respect to the Navy's 4-12-95 refusal or failure to fulfill its money-mandating, legal duties and obligations under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995):

Item 8: "IS EMPLOYEE'S PRESENT CONDITION DUE TO THE INJURY FOR WHICH COMPENSATION IS CLAIMED? YES";

Item 9: "IS EMPLOYEE TOTALLY DISABLED FOR USUAL WORK? YES";

Item 12: "WHAT TREATMENT IS EMPLOYEE RECEIVING AND HOW OFTEN IS IT GIVEN? home PT therapeutic exercises, psychiatric care for depression, Doxepein"; and

Item 15: "WILL DISABILITY FOR REGULAR WORK CONTINUE FOR 90 DAYS OR LONGER? YES".

Based on App. E-14 and/or the fact that the Navy was fully aware and has total and complete knowledge of Agustin's FECA-approved occupational injury and medical conditions (see 5 USC Section 8147(b)), the Navy was fully aware of, and has total and complete knowledge, that Agustin was in great and urgent need to "[r]eceive[] medical…treatment…[wa]s incapacitated for the performance of duties by physical…injury" (5 CFR Section

630.401(a)(1), (2)), and that his incapacitation for work would continue for 90 days or longer, or at least up to about 6/6/95. The Navy's 4-12-95 unjustified or unwarranted personnel action refused or "**fail[ed] to...confer...[Agustin's pay, rights and] benefit[s]" which he "is entitled by statute or regulation"** (5 CFR Section 550.803 (bold and underline added)) pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), **had violated** Agustin's pay, rights, and benefits pursuant to these *money-mandating* authorities, had violated his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment, and had aggravated his occupational injuries or conditions. See App. E-32, which had established the aggravation of Agustin's occupational injuries or conditions. In addition to his April 1994, accepted back and neck injuries, "[t]he specific conditions accepted is: major depression (296.2); post-traumatic stress disorder (309.81); organic brain syndrome (294.1)."

On 4-12-95, pursuant to Civilian Personnel Instructions (CPI) 752—Department of the Navy Disciplinary Actions, the Navy issued its personnel/pay action against Agustin based on the punishment or disciplinary action charge of "unavailability for duty" (App. E-4) or his enjoyment or exercise of his statutory and regulatory rights pursuant to FECA, 65 Statute 681, Section 204, and 5 CFR Section 630.401(a)(1), (2), which were **all approved or authorized absence and which were all with the blessing of the federal government—Agustin's constitutionally protected conduct.** See the 4-12-95 personnel action (App. E-7 to E-8) (DECISION ON PROPOSED SEPARATION), which was a punishment or "disciplinary action" for Agustin's enjoyment of his

fundamental and substantive Due Process rights or liberty interests by the exercised of his statutory and regulatory rights pursuant to all the said money-mandating authorities. See App. E-11. The Navy's 4-12-95 "action[] include[s] personnel action[] and pay action[] (...in combination)" (5 CFR Section 550.803 (1-1-03) (underline added)), was a "wrongful deprivation of [Agustin's] pay[, rights, or benefits]" (Testan, 424 U.S., at 406), had violated Agustin's fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment, and had aggravated his occupational injuries or conditions. The Navy's 4-12-95 personnel/pay action was not due to any misconduct; nor any violation of, or failure to follow, any law, rule, regulation, or policy; nor any use of alcohol or illegal drugs; nor any unapproved absence or absence without leave (AWOL) by Agustin.

From 1-23-95 thru 4-21-95, Agustin was receiving his statutorily created property—his sick leave benefits or entitlement, which he "is entitled by statute or regulation" (5 CFR Section 550.803) pursuant to our money-mandating statutes or regulations--65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995). On and after 4-21-95, Agustin was in great need of medical care or treatment, he was in great need of enjoying or exercising his fundamental and substantive Due Process right or liberty interest to medical care or treatment, and pursuant to these money-mandating authorities, Agustin has statutory and regulatory "'right[s] to...use'" (Philips, 524 U.S., at 170) his accumulated annual leave and accumulated sick leave as "sick leave [benefits] due to [FECA approved] occupational injury" (exhibit 62), Agustin's "entitlement to [sick leave] benefits had been established" (American Mfrs. Mut. Ins. Co. v. Sullivan, 119

S.Ct. 977, 990 (1999)), and "the interest of [Agustin] in continued receipt of these [sick leave] benefits is a statutorily created 'property' protected by the Fifth Amendment" (Mathews v. Eldridge, 397 U.S. 319, 332 (1976) (citation omitted)).)

On 4-21-95 (the effective date of the 4-12-95 personnel/pay action), Agustin has unused and remaining "252.90" hours of accumulated sick leave and "444.80" (App. E-13) hours of accumulated annual leave in his leave account--his private property for the purposes of our U.S. Constitution's Takings Clause--which he "is entitled by statute or regulation" (5 CFR Section 550.803), and which he has statutory and regulatory "'right[s] to...use'" (Philipps, 524 U.S., at 170) as sick leave benefits "due to [his FECA approved] occupational injury" (App. E-62) until his sick leave and annual leave accounts "become[] exhausted" (App. E-6) pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995) and under his fundamental and substantive, constitutional Due Process rights or liberty interests to medical care or treatment, to enjoy or exercise his statutory and regulatory rights, and to continuous federal employment without violation of his statutory and regulatory rights; and under his constitutional rights to equal protection of the laws, and to protection from the unconstitutional taking of his property, rights, or interests without just compensation—his constitutionally-protected rights or benefits which the Navy had quite clearly violated by its 4-12-95 "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)).

On and after 4-21-95, based on Dr. Chattha's 3/6/95 medical report (App. E-14), the Navy was fully aware of, and has total and complete knowledge, that Agustin was in

great and urgent need to "receiv[e]" medical care or treatment, was "incapacitated" for work due to occupational "injury" (5 CFR Section 630.401(a)(1), (2)), that his incapacitation for work would continue for 90 days or longer, or at least up to about 6/6/95, and the Navy had quite clearly violated or deprived Agustin's pay, rights or benefits pursuant to the said money-mandating authorities and pursuant to his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment. See App. E-14.

On 12-18-96, Agustin filed his Rehabilitation Act/Title VII Complaint before the U.S. District Court for Northern California (or "District Court"), (*Remigio I. Agustin v. Secretary, Department of the Navy*, No. C-96-4527), *which involved distinctly different claims and distinctly different relief, including front pay and compensatory relief*, based on Agustin's claims pursuant to the Rehabilitation Act and Title VII statutes, which the Claims Court has no jurisdiction. See App. SC5-1.

On 8-8-99, the District Court granted summary judgment against Agustin with respect to all his Rehabilitation Act and Title VII claims. However, in its 8-9-99 Order, the District Court did ***not*** mention or did ***not*** make any ruling with respect to any Takings claim or any Back Pay Act claim. See App. SC5-1.

On 6-6-00, (#1, at App. C-12) Agustin timely filed his Complaint in the Claims Court pursuant to the Tucker Act and the Back Pay Act **based on the Navy's violation of our money-mandating, federal statutes and regulations**. Agustin's Complaint in the Claims Court was not pursuant to the Civil Service Reform Act (CSRA) or Title VII. Agustin timely filed and properly pleaded his justiciable and

remediable, Tucker Act and/or Back Pay Act claim that the Navy:

> [page 13] "***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA--at the time when he needed it most. (See 5 USC Section 8118(c): 'An employee may use annual or sick leave' for a job-related disability; and 20 CFR 10.310(a): 'An employee who sustains a job-related disability may use sick or annual leave or both to avoid interruption of income')...[page 15] The United States' **current and ongoing** wrongful behavior--its unlawful and/or unconstitutional deprivation forever of disabled federal employees' constitutionally protected, statutory right to 'use' their accumulated sick leave--is a very clear, **current and ongoing** ''obliteration of a right which Congress' has given [all federal] employees'''.

06/06/2000 Claims Court Complaint, at pages 13 and 15.

Such "statutory rights under 5 USC Section 6307 and/or under FECA" includes Agustin's "'right to...use''' (Philipps, 524 U.S., at 170) his accumulated annual leave and accumulated sick leave as sick leave benefits "due to [FECA approved] occupational injury" (exhibit 62) which the Navy has (1) ***unlawfully*** deprived and (2) ***unconstitutionally*** took away from him through its 4-12-95 personnel action. See App. SC5-1 to 2.

On 4-13-01, the U.S. Department of Labor (DOL) granted Agustin's FECA compensation benefits retroactive from February 2, 1995. See App. E-34 and E-35. (From 2-2-95 to 4-21-95, Agustin used about 448 hours of sick leave,

which should be charged to FECA compensation, and which was the subject claim or issue of Agustin's **07/31/2001 Motion to amend** to add or include his 448 sick leave hours (07/31/2001, #21, at App. C-13 or AA-2) (part of CLAIM 1)). See App. G-1. DOL's letter (App. E-32, also dated 4-13-01), had established the aggravation of Agustin's occupational injuries or conditions. In addition to Agustin's back and neck injuries which had been accepted as occupational injuries or conditions in April 1994, "[t]he specific conditions accepted is: major depression (296.2); post-traumatic stress disorder (309.81); organic brain syndrome (294.1)." App. E-32.

On 5-23-01, the District Court made final lack of jurisdiction ruling over the said two claims in its May 23, 2001 Order, **which have *res judicata* (issue preclusion) effect** with respect to the issue of the District Court's lack of jurisdiction over such claims. The District Court ruled that: (1) Agustin "never asserted" a "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2, at App. E-27); and (2) that Agustin "failed to alleged these violations in his Complaint"—"his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA by terminating him" (App. E-30). The District Court has quite clearly and unequivocally ruled that Agustin has **no** "claim that the Navy violated his rights ***under 5 USC Section 6307 and/or FECA***" pending before it, (App. E-30, (bold, italics, and underline added)). "Plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA…The Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims." App. E-30. See App. SC5-2 to 3.

Also see 07/26/2001, #18 (which was filed by leave of the Judge) and #19 (Judge's Order), at App. AA-1 or C-13.

On 6-8-01, the District Court reaffirmed its 5-23-01 lack of jurisdiction ruling with respect to "[t]he Claim Pursuant to 5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2) Plaintiff also requests that the Court alter its judgment with respect to his claim that the Navy's denial of paid sick leave violated the above-cited laws. The Court has reviewed plaintiff's Complaint in this case, and finds that plaintiff never alleged a cause of action under these statutes and regulations. See Complaint of December 18, 1996." App. E-71. See App. SC5-3 to 4.

The District Court did not make its final, "lack of jurisdiction" rulings over any Back Pay Act and Takings claims based on "motion for voluntary dismissal" ground (Keene, 508 U.S., at 203), "sovereign immunity" ground (Keene, at 204), statute of limitations ground, or any other grounds, but pursuant to Rule 41(b)'s "lack of jurisdiction" exception provision. The District Court also ruled that "the [District] Court believes that amendment of the Complaint at this late juncture—more than four years after the inception of the suit—would prejudice defendant, plaintiff may not now seek relief pursuant to these statutes and regulations". (App. E-71 to E-72). To make matters unjustly worst for Agustin, contrary to the interest of justice, the District Court refused or failed to "transfer" (Keene, at 215 n. 11), pursuant to 28 USC Section 1406(a) or 28 USC Section 1631, any judicially cognizable Back Pay Act and Takings claims to the Claims Court. See App. SC5-2 to 4.

Based on the District Court's quite clear and unequivocal 5-23-01 and 6-8-01 **lack of jurisdiction**

rulings, "comparison" between the claims in the two Complaints is moot, or is not required or necessary, because there is no "comparable claim[]"--**no** *5 USC Section 6307 and/or FECA* claim--before the District Court to compare with (see Keene, 508 U.S., at 210).

Furthermore, based on the District Court's 5-23-01 and 6-8-01 **lack of jurisdiction rulings** (in App. E-27 (at footnote 2), E-30, and E-71), the following facts are quite crystal clear and beyond any doubt, that: (1) Agustin has no claim "pending" in the district court, nor in any other court, "for or in respect" (28 USC Section 1500) to (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (App. E-27, at footnote 2) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA by terminating him" (App. E-30) or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71); and that (2) there was **no final judgment on the merits** of the said two claims at the time of filing of Agustin's 6-6-00 Complaint in the Claims Court. See Federal Rules of Civil Procedure (FRAP) 41(b), our governing Federal Rules of Civil Procedure (FRAP) Rule 41(b)-case law in Costelo v. United States, 365 U.S. 265, 285-286 (1961), (or 'Costelo') and in Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek'), and App. P-1.

(Concerning Agustin's Rehabilitation Act and Title VII-District Court case, on 12-7-00, the District Court granted summary judgment for the Navy. Agustin, a pro se Complainant, then filed motions for reconsideration of the District Court's 12-7-00 Judgment, which were dated 12-11-00, 2-5-01, 5-31-01, and 7-2-01. On 6-8-01, the District Court ruled that: "The Court DENIES plaintiff's ex parte

motion for leave to alter or amend the judgment in this case. The Judgment of December 7, 2000 stands." App. E-72/District Court's 6-8-01 Order. On 7-11-01, Agustin's notice of appeal of the District Court's 12-7-00 summary judgment was filed by the District Court. Based on Agustin's 7-11-01 notice of appeal of the District Court's 12-7-00 summary judgment, the Ninth Circuit ruled that: "Remigio I. Agustin appeals pro se the district court's orders denying his motions **to reconsider [the District Court's 12-7-00] summary judgment** for the Navy in Agustin's employment discrimination action, and we affirm. We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a notice of appeal within 60 days of those orders." Agustin v. Dalton, 37 Fed. Appx. 895 (9th Circuit (June 17, 2002)), (bold and underline added).The Ninth Circuit ruled that (1) **it has "jurisdiction** over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration" (id., bold and underline added) of the District Court's 12-7-00 summary judgment **based on Agustin's 7-11-01 notice of appeal of the District Court's 12-7-00 summary judgment**, and affirmed the said orders, which include the District Court's 5-23-01 and 6-8-01 Rule 41(b)-"lack of jurisdiction" rulings over Agustin's takings claim (CLAIM 6) and his back pay act claim (CLAIM 4), but somehow, like in magic, mystifyingly and horrifyingly concluded, that (2) **the only one, and the same, Agustin's 7-11-01 notice of appeal was *not* timely filed**[1],

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[1] "[Page 2] On December 7, 2000, the District Court denied plaintiff's motion for reconsideration and again entered judgment in favor of the defendant, but requested additional briefing. GER 141, 154; CD# 84, # 85. Thereafter, the District Court entertained several ex parte motions by Agustin, considering them motions for reconsideration or to amend or alter the judgment. On June 8, 2001, the District Court entered its order denying Agustin's motion to amend or alter the judgment. GER

thus extinguishing Agustin's Due Process-*guaranteed* appeal rights without affording him the opportunity to be heard and for a fair and full hearing on the merits of his timely appeal. Id., (bold and underline added). See App. SC5-4 to 5.

On 1-13-03, ***to add insult to injury, in a quite crystal clear travesty or miscarriage of justice, Agustin's petition for a writ of certiorari (Agustin v. England, ___ U.S.___, 123 S. Ct. 903 (2003)) was denied by the Supreme Court,*** thus unfairly and unjustly extinguishing **forever** Agustin's Fifth Amendment *guaranteed*-Due Process protected-appeal rights. See App. SC7-1 to 2, and SC5-5.

To date, Agustin is still mystified and still does not understand such quite crystal clear miscarriage and travesty of justice, in his quite long and quite nightmarish search and quest for justice. **And now, with his properly pleaded, Back Pay Act claim (CLAIM 4) and his Takings claim**

170; CD # 90. Agustin filed a notice of appeal on July 11, 2001. GER 175; CD # 92. This Court has jurisdiction to hear the appeal pursuant to 28 USC Section 1291. **Agustin filed his notice of appeal within sixty days of the District Court's order of [page 3] June 8, 2001, denying leave to alter or amend the judgment. Therefore, his notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure**." Page 2 and 3 of the Navy's Brief before the Ninth Circuit, (bold and underline added).

"We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a [7-11-01] notice of appeal within 60 days of those orders. *See Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5. F3d 1255, 1262 (9th Cir. 1993). We lack jurisdiction to address Agustin's [7-11-01] appeal of the district court's summary judgment because Agustin failed to file a notice of appeal within 60 days of entry of the order denying his timely, post-judgment tolling motion. *See* Fed. R. App. P. 4(a)(1)(B); 4(a)(4)(A)(iv) (2002); *Webb v. Ada County*, 285 F.3d 829, 836 (9th Cir. 2002)." Agustin v. Dalton, 37 Fed. Appx. 895 (9th Circuit (June 17, 2002)), (insert added). See App. SC7-1 to 2.

(CLAIM 6) in the Claims Court, Agustin could not believe that he was not even afforded his Due Process rights to be heard, and to a fair and full hearing, on the merits of: (a) his claim that Rule 41(b) precludes the application of 28 USC Section 1500 over Agustin's Back Pay Act and Takings claims in the instant case; and (b) his timely filed and judicially cognizable Back Pay Act and Takings claims, including the most elementary and fundamental merit issue as to the interpretation, relevance, and applicability of the Tucker Act and the Back Pay Act with respect to such claims—the two statutes which Agustin has properly pleaded to establish the Claims Court's jurisdiction and upon which relief could be granted. However, Agustin still hopes and prays that, in the end, justice would appear and eventually prevail.)

On 07/31/2001, (#21, at App. C-13 or App. AA-2), based on the DOL's 4-13-01 grant of Agustin's FECA compensation retroactive to 2-2-95, Agustin filed his **07/31/2001 Motion to amend** to add or include his 448 sick leave hours (part of CLAIM 1) (see App. H-1 to H-6) in the Claims Court. After Defendant has responded and after Agustin filed his reply, without any discussion of its merits, the Claims Court summarily denied this motion and claim in its 9-5-03 Order. See App. G-1 and App. H-1 to H-6.

Based on the DOL's 4-13-01 grant of Agustin's FECA compensation benefits (see App. E-34), which Agustin had accepted (in lieu of Office of Personnel Management (OPM) disability retirement benefits) retroactive from 2-2-95, Agustin's FECA compensation for 1996 and 1997 is non-taxable pursuant to 26 USC Section 104(a)(1), he has a statutory right to non-taxable FECA compensation, and Agustin's 1996 and 1997 federal tax payments should be refunded to him, (see CLAIM 5). This

tax refund claim was the subject claim or issue of Agustin's 08/31/01 Motion to amend (#27, at App. AA-2 or App. C-14) to include his tax refund claims for tax years 1996 and 1997 (CLAIM 5).

On 08/31/2001, based on the IRS' 08/27/2001 denial of Agustin's 1996 and 1997 tax refund claims, Agustin filed his **08/31/2001 Motion to amend (#27, at App. AA-2 or App. C-14)** to include his 1996 and 1997 tax refund claims (see CLAIM 5 at App. G-2) in the Claims Court. See App. I-1 to I-14. This tax refund claim for tax years 1996 and 1997 *involves entirely separate, distinct, and different statutory or constitutional bases*. The Claims Court has subject matter jurisdiction over Agustin's 1996 and 1997 tax refund claims pursuant to 28 USC Section 1346(a)(1) or 28 USC Section 1491(a). After Defendant has responded and after Agustin filed his reply, without any discussion of the merits of his tax refund claims or the merits issues, (such as, whether, pursuant to 26 USC Section 104(a)(1), based on the DOL's grant of Agustin's FECA compensation award retroactive from 2-2-95, Agustin has a federal statutory right to a non-taxable FECA compensation for tax years 1996 and 1997; whether the IRS's denial of his 1996 and 1997 tax refund claims had violated such federal statutory right, and whether such claim is justiciable and remediable in the Claims Court pursuant to 28 USC Section 1346(a)(1) or 28 USC Section 1491(a), or any reason why "justice so requires" (FRAP Rule 15(a)) that the motion should be denied), summarily denied this motion and claim in its 9-5-03 Order. See App. G-2.

On 02/27/2003, (#46, at App. C-16), Agustin filed his 02/27/2003 Motion or MOTION TO SUPPLEMENT THE RECORD IN THE INSTANT CASE BASED ON OUR U.S. SUPREME COURT'S RECENT REANNOUNCEMENT OF: (1) ITS "CLEARLY ESTABLISHED PRECEDENTS"-

CASE LAW IN EARLY V. PACKER, U.S. NO. 01-1765 (11-4-02), AND (2) ITS FEDERAL AGENCY ACTION IN VIOLATION OF "ANY LAW"--SUCH ACTION MUST BE SET ASIDE-CASE LAW IN FCC V.NEXT WAVE PERSONAL COMMUNICATIONS, INC., U.S. NO. 01-653 (1-27-03). See App. K-1 to K-7.

On 03/14/2003, Agustin filed his "White Mountain Motion" or "MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S (1) REANNOUNCEMENT OF ITS TUCKER ACT JURISDICTION-CASE LAW AND (2) ITS ANNOUNCEMENT OF ITS NEW "FAIR INTERPRETATION" RULE OR "FAIR INFERENCE" CASE-LAW IN UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE, [123 S.Ct. 1126 (2003]" in the Claims Court, (#48, at App. C-16). After Defendant has responded and after Agustin filed his reply, without any discussion of its merits, the Claims Court summarily denied this motion and claim in its 9-5-03 Order. See App. M-1 to M-7.

On 03/31/2003, (#55, at App. C-17), Agustin filed his "Brown Motion" or "MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S REANNOUNCEMENT OF ITS FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE-CASE LAW IN BROWN V. LEGAL FOUNDATION OF WASHINGTON, [122 S.Ct. 1406 (2003)]" in the Claims Court. After Defendant has responded and after Agustin filed his reply, without any discussion of its merits, the Claims Court summarily denied this motion and claim in its 9-5-03 Order. See App. O-1 to O-9.

On **05/06/2003, (#66, at App. AA-2 or C-18), Agustin's Motion to Amend to include CLAIMS 9 and 10** was filed in the Claims Court. See App. Q-1 to Q-10. This motion was based on our U.S. Supreme Court's quite recent announcement, or reannouncement, or clarification of its constitutionally protected speech-case law in Virginia v. Black, 123 S.Ct. 1536 (2003) (or 'Black') and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, 123 S.Ct. 1683 (2003) (or 'Hyatt'). Based on the quite recent, Black and Hyatt opinions, Agustin properly pleaded to the Claims Court that "the protection of [constitutionally protected]...speech" in Black (123 S.Ct., at 1547) and the protection of "constitutionally protected ["speech" and] conduct" in Arnett (416 U.S., at 162, 163) has "no constitutionally significant distinction" (Hyatt, 123 S.Ct., at 1690). See App. Q-5. After Defendant had responded and after Agustin filed his reply, without any discussion of its merits, without any reason why "justice so requires" (FRAP Rule 15(a)) that the motion should be denied), the Claims Court summarily denied this motion and claims in its 9-5-03 Order. See App. Q-1 to Q-10, and G-3 to G-4.

On 08/25/2003, (#84, at App. C-20), Agustin filed his "Adams Motion" or "MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF THIS COURT'S MOST RECENT COLLATERAL ESTOPPEL, OR ISSUE PRECLUSION, OR RES JUDICATA-CASE LAW IN ADAMS V. THE UNITED STATES, CFC NO. 00-447C (AUGUST 11, 2003)".[2] Agustin's takings claim (CLAIM 6, which includes the amounts in CLAIMS 1 and 2) and his back pay claim (CLAIM 4) are each above $10,000, and

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[2] See the Adams v. The United States opinion in the Internet at: http://www.uscfc.uscourts.gov/Opinions/Block/03/BLOCK.Adams.pdf
Also see Agustin's Adams Motion at App. R-1 to R-8.

Agustin could not, as a matter of law, have raised his Tucker Act-takings claims and his Tucker Act-Back Pay Act claim under the prior, District Court litigation, (see Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), and App. R-7 to R-8; also see App. G-1 to G-3—Agustin's ten (10) CLAIMS). Without allowing Defendant to respond, without allowing a full briefing by both parties, and without any discussion of its merits, the Claims Court unjustly denied this motion in its 9-5-03 Order. See App. R-1 to R-8.

With Agustin's quite relevant motions (see App. F-1 to F-4) with respect to our U.S. Supreme Court's quite recent announcement, reannouncement, or clarification of its governing case laws which are quite relevant and/or quite controlling to the claims or issues in the instant case, and with Agustin's 08/25/2003 Adams Motion (see App. R-1 to R-7), Agustin was getting closer and closer to the plain truth that his statutory, regulatory, and constitutional rights were violated by the Navy's 4-12-95 personnel/pay action, and **that the Navy's violation of our money-mandating federal statutes and federal regulations were justiciable and remediable in the Claims Court pursuant to the Tucker Act and the Back Pay Act**. On 9-5-03, in violation of Agustin's Fifth Amendment constitutional right "to petition" the Claims Court for the interpretation, relevance, and applicability of the Tucker Act and the Back Pay Act in the instant case (see App. J-1), and in violation of his Due Process rights to be heard and to a fair and full hearing of the merits of his claims, without even discussing as to whether the Tucker Act and the Back Pay Act are relevant or controlling in the instant case—the two (2) statutes upon which Agustin's claims were founded and upon which relief could be granted, the Claims Court issued its quite unfair, quite unjust, and quite clearly erroneous 9-5-03 dismissal

Order (App. B-1 to B-6). The Claims Court Order was devoid of a fair and full hearing of the most basic, elementary, and fundamental **merits issues** of Agustin's claims, among others: (1) the interpretation, relevance, and applicability of the Tucker Act and the Back Pay Act in the instant case, and (2) whether the CSRA and the Back Pay Act are "capable of co-existence". Morton v. Mancari, 417 U.S. 535, 551 (1974). See item **V**, at pages 21 to 24 of Informal Brief.

On 09/05/2003, (#85, at App. C-20), the Claims Court's dismissal Order (App. B-1 to B-8) was filed.

On 09/08/2003, (#86, at App. C-20), the Claims Court's Judgment (App. B-9) was filed.

On 09/30/2003, (#87, at App. C-20), Agustin timely filed his Notice of Appeal (App. C-1). Agustin's Informal Brief before the Federal Circuit is at App. BB-1 to BB-40.

On March 3, 2004, the Federal Circuit decided Agustin's case. See App. A-1 to A-7.

On March 9, 2004, Agustin timely filed his petition for panel rehearing and rehearing en banc. See App. CC-1 to CC-19.

On April 1, 2004, the Federal Circuit denied Agustin's petition for panel rehearing and rehearing en banc. See App. C-1.

position prior to January 13, was this person working for you on January 13, Mr. MacLean?

A. The person who was occupying the position prior to you?

Q. Yes, sir.

A. Yeah, he was working for me on January 13th.

Q. Was this person working for you on February 10, 1995?

A. Yes.

Q. Was he working for you on April 21st, 1995?

A. Now, what date was that?

Q. April 21st, 1995, the effective date of the firing of the Appellant.

A. Yes, I believe he was, but the person that had been occupying that position was no longer a planner and estimator.

Q. Did you -- what is this person's EEO racial designation, Mr. MacLean?

MR. DAWSON: Would you mind talking up a little louder, we couldn't hear you.

Q. What is this person's EEO racial designation? Is the employee White, Hispanic, Black?

MR. DAWSON: What's the ethnic background of the employee?

THE WITNESS: He was White.

BY MR. AGUSTIN:

Q. After April 21st, 1995, did you submit a Request for

Personnel Action to fill Appellant's former position with a permanent appointment?

A. No.

Q. From January 13, 1995, to April 21st, 1995, was Appellant on approved sick leave status?

A. Give me those dates again.

Q. January 13 to April 21st, 1995.

A. I am not sure of the specific dates. I do know that Mr. Agustin had a leave buy-back that we approved sick leave for as a result of that buying back of leave. But I'm not sure of the specific date when that began and when it ended.

MR. AGUSTIN: That's the service card from Payroll Office which indicates I was on sick leave from January 13th to April 21st. Is the Agency disputing that?

MR. DAWSON: No, we are not.

MR. AGUSTIN: Thank you.

BY MR. AGUSTIN:

Q. Mr. MacLean, was Appellant on approved sick leave because he was disabled?

A. He was on approved sick leave because he applied for sick leave and based upon the record he had a doctor's medical report that -- that said that he was unavailable for duty.

MR. AGUSTIN: Your Honor, would you have Mr. MacLean answer the question, please?

ADMINISTRATIVE JUDGE LEE: I think he has.

2-10-95

12752

10 Feb 95

From: Head, P-3 Weapon Systems Engineering Division (Code 052)
To: Remigio I. Agustin, P-3 Weapon Systems Engineering Division (052)

Subj: ADVANCE NOTICE OF PROPOSED SEPARATION

Ref: (a) CPI 339
(b) CPI 752
(c) Medical Evaluation by Dr. Dilbagh Singh Chattha of 14 June 1994
(d) R. Agustin Response dtd 23 Sep 94

1. In accordance with the provisions of references (a) and (b), you are hereby provided at least 30 calendar days advance notice of the proposal to separate you from the rolls of this Command for unavailability for duty.

2. On 14 December 1993, you sustained an injury which was accepted by the Department of Labor as an occupational injury. Since that date, you have not returned to work in any capacity.

3. Reference (c) states that you are still suffering from severe headaches, severe back pain, pain in both legs along with dizziness and rare vomiting. You submitted reference (d) wherein you state "I am permanently totally disabled because of my physical and psychiatric condition."

4. This proposed action, if found warranted, will not be effective until after the expiration of the 30 day notice period.

5. You have the right to be represented in this matter by one person of your choice. You and/or your representative have the right to respond to this proposal orally and/or in writing and review the material which is relied upon to support the reasons given in this notice. Arrangements for such a review may be made by contacting your supervisor. You may submit affidavits and other documentary evidence in support of your written reply. Your reply should be made to:

Technical Director, Product Support Department (Code 05A)
Naval Aviation Depot, Alameda
Telephone No. (510) 263-6951

6. Any reply you make will be given full consideration in the decision on this proposed action. In order to be considered, your request for an appointment to make an oral reply and/or a written reply must be received by the Technical Director, Product

E-4

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Encl (3) 2

Subj: ADVANCE NOTICE OF PROPOSED SEPARATION

Support Department (Code 05A) not later than seven calendar days after your receipt of this letter. If you need additional time to make your reply, you must submit a request in writing within five calendar days of receipt of this letter stating the reason and number of additional days required. Your request for an appointment to make an oral reply may be made by telephoning the Technical Director, Product Support Department's secretary at (510) 263-6951.

BRUCE MACLEAN

E-5

E-5

12630
052:BM
28 Feb 95

MEMORANDUM

From: Head, P-3 Weapon System Engineering Division (Code 052)
To: Remigio I. Agustin, P-3 Weapon System Engineering Division (Code 052)

Subj: REQUEST FOR SICK LEAVE

Ref: (a) Your ltr of 16 Feb 95

Encl: (1) Application For Leave

1. This is in response to reference (a) and to advise you that your request for sick leave is approved. A copy of your Application For Leave is provided herewith as enclosure (1). You are reminded that if your sick leave account becomes exhausted your absence will automatically be charged to annual leave and if that account becomes exhausted your absence will be charged to leave without pay.

B. MACLEAN

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E-6

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~~EXH. J~~

7

E-7

1-12-95
A-4-14-95

12339
05A:TEM
APR 12 95

From: Product Support Technical Director (Code 05A)
To: Remigio I. Agustin, P-3 Weapon Systems Engineering Division (Code 052)

Subj: DECISION ON PROPOSED SEPARATION

Ref: (a) NAVAVNDEPOT Alameda ltr 12752 of 10 Feb 95
(b) Your ltr of 13 Feb 95
(c) NAVAVNDEPOT Alameda ltr 09251:RD of 24 Feb 95
(d) Your ltr of 20 Mar 95
(e) NAVAVNDEPOT Alameda ltr 12339 05A: TMCF of 28 Mar 95
(f) Your ltr of 3 Apr 95

Encl: (1) Merit Systems Protection Board (MSPB) regulation and Appeal Form

1. Reference (a) provided you at least 30 calendar days advance notice of the proposal to separate you from the rolls of this Command for your unavailability for duty.

2. Reference (a) also provided you an opportunity to reply to the proposed action either in person and/or in writing. By reference (b) you requested an extension "for up to 30 days" to allow for case preparation relative to an oral and/or written response to reference (a). Reference (c) informed you that your request for additional time was granted and set forth a date and time for the oral and/or written response [24 March 1995, 1000]. However, you did not report for the scheduled meeting and, instead, submitted reference (d) which requested a second extension "for up to 30 days" to allow for case preparation relative to reference (a). As a result, reference (e) was sent to you providing a final opportunity to respond to reference (a), either in person and/or in writing. Again a meeting was scheduled for the purpose of allowing you to respond to reference (a) and the date and time [10 April 1995, 1000] were provided. You failed to report for the scheduled meeting and you failed to submit a written response. You, instead, submitted reference (f), requesting another extension of time. The Command has provided you several opportunities to respond either in person or in writing, or both, to reference (a); however, you have failed to do so. Accordingly, I will render a decision based on the written record.

3. In making my decision on your proposed separation, I have given consideration to all aspects of your case. I find that the facts set forth in reference (a) are substantiated and warrant

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~~12~~

~~FOUO - f1~~

Subj: DECISION ON PROPOSED SEPARATION

your separation to promote the efficiency of the service. It is therefore my decision to separate you from the rolls of this Command. The effective date of this action is 21 April 1995. A Standard Form 50 effecting this action will be provided to you.

4. You may appeal this decision to the Merit Systems Protection Board (MSPB), 525 Market Street, 28th Floor, San Francisco, CA 94105. Such an appeal must be filed during the period beginning on the day after the effective date of the action being appealed and ending 30 days after the effective date. If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely. Enclosure (1) is the MSPB regulation and appeal form.

5. You have one year from the effective date of this action to apply for disability retirement. This action in no way reflects adversely upon your service to the Department of the Navy.

T. E. MCFARLAND

E-8

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of this question anyway? Let's get to the point, Mr. Agustin.

MR. AGUSTIN: Well, CPI says in 5-2, Your Honor, pertains to disciplinary action.

ADMINISTRATIVE JUDGE LEE: That still doesn't answer my question.

MR. AGUSTIN: I -- one of the question that I would ask Mr. MacLean is whether this proposal notice is a disciplinary action?

ADMINISTRATIVE JUDGE LEE: It is a disciplinary action.

MR. AGUSTIN: Well, would -- does Mr. MacLean agree to that, Your Honor?

ADMINISTRATIVE JUDGE LEE: It's a disciplinary action as far as the Board is concerned and that's what matters.

MR. AGUSTIN: Okay, Your Honor.

BY MR. AGUSTIN:

Q. In your proposal notice you also cited Dr. Chalis' (phonetic) June 14, 1994, medical report. Did you read this report, Mr. MacLean?

A. Yes, I did.

Q. On February 10, 1995, the date you issued the proposal notice, was Dr. Chalis' medical report almost seven months old?

A. Again, I'd have to look at the -- at the time of the notice. Oh, yeah, that's correct.

Q. Well, since Dr. Chalis' medical report was already

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THIS REPORT CONTAINS E-13 SUBJECT TO THE PRIVACY ACT OF 1974 AS AMENDED

DEPARTMENT OF DEFENSE
CIVILIAN LEAVE AND EARNINGS STATEMENT

04/29/96

05/06/96

AUGUSTIN BENIGIO I

573-29-9096

ALFA FED CE UH

MD 08 00 | 28.47 | 42.71 | 240 | 01/00/00

FED M 4
CA M 4

CSRS: 10230.83

	CURRENT	YEAR TO DATE
GROSS PAY	13002.26	31132.42
TAXABLE WAGES	15020.00	32173.84
NONTAXABLE WAGES		
TAX DEFERRED WAGES	66.94	925.44
DEDUCTIONS	8350.00	10831.94
AETC		
NET PAY	8442.40	20300.48

TSP DATA
5%
G FUND: 0%
F FUND: 0%
C FUND: 100%

EARNINGS FOR TSP CALC (CURRENT) 1138.80

EARNINGS FOR TSP CALC (YTD) 10488.00

CURRENT EARNINGS

TYPE	HOURS/DAYS	AMOUNT	TYPE	HOURS/DAYS	AMOUNT	TYPE	HOURS/DAYS	AMOUNT
REGULAR	40.00	1138.80	LUMP SUM PD	444.00	12083.46			

DEDUCTIONS

TYPE	CODE	CURRENT	YEAR TO DATE	TYPE	CODE	CURRENT	YEAR TO DATE
CHARITY			3.50	FEGLI	Z	10.23	92.07
FEGLI OPTNL	ABC	22.22	199.98	MEDICARE		200.13	451.42
ORG/UNION	BVA	3.50	24.50	RETIRE, CSRS	1	79.72	1252.82
TAX, FEDERAL		4222.37	8468.75	TAX, STATE	CA	764.75	1375.48
TSP SAVINGS		56.94	923.44				

LEAVE

TYPE	PRIOR YR BALANCE	ACCRUED PAY PD	ACCRUED YTD	USED PAY PD	USED YTD	DONATED/ RETURNED	CURRENT BALANCE	USE-LOSE/ TERM DATE
ANNUAL	240.00		56.00					
SICK	808.90		28.00	40.00	584.00		252.00	
RESTORED			148.80					
HOLIDAY					10.00			00/00/00

REMARKS

ENROLL IN TSP - DEADLINE 31 JUL
BUY US SAVINGS BONDS
LUMP SUM PAID
RETROACTIVE LEAVE ADJUSTMENTS PROCESSED
RETROACTIVE TIME AND ATTENDANCE ADJUSTMENTS PROCESSED

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~~217~~

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U.S. DEPARTM. OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

ATTENDING PHYSICIAN'S SUPPLEMENTAL REPORT

FOR INSTRUCTIONS SEE REVERSE SIDE

1. NAME OF INJURED EMPLOYEE (Last, first, middle): Augustin Remigio —
2. OWCP FILE NUMBER, IF KNOWN: A13-1035016
3. HOME MAILING ADDRESS (Include zip code): 169 Austin Ave Hayward ca 94544
4. SOCIAL SECURITY NUMBER: 573-29-9096
5. DATE AND HOUR OF INJURY (Mo., day, year): 12/14/93 ☒ AM ☐ PM
6. PERIOD COMPENSATION IS CLAIMED AS A RESULT OF PAY LOSS (Mo., day, year): FROM: Dec 93 THROUGH: Continue
7. DATE OF MOST RECENT EXAMINATION (Mo., day, year): 3/6/95
8. IS EMPLOYEE'S PRESENT CONDITION DUE TO THE INJURY FOR WHICH COMPENSATION IS CLAIMED? ☒ YES ☐ NO
9. IS EMPLOYEE TOTALLY DISABLED FOR USUAL WORK? ☒ YES ☐ NO
10. DESCRIBE NATURE OF PRESENT IMPAIRMENT: post traumatic stress disorder, post traumatic headache syndrome
11. STATE DIAGNOSIS: lowback pain c Radiculitis
12. WHAT TREATMENT IS EMPLOYEE RECEIVING AND HOW OFTEN IS IT GIVEN? home PT therapeutic exercises psychiatric care for depression Dexelpro
13. WHAT PERMANENT EFFECTS, IF ANY, ARE ANTICIPATED? unable to write now
14. DESCRIBE ANY CONCURRENT DISABILITY EMPLOYEE HAS WHICH IS NOT RELATED TO THIS INJURY: No
15. WILL DISABILITY FOR REGULAR WORK CONTINUE FOR 30 DAYS OR LONGER? ☒ YES ☐ NO IF NO, APPROXIMATELY WHAT DATE WILL EMPLOYEE BE ABLE TO RETURN TO WORK? (Mo., day, year)
16. IF EMPLOYEE IS ABLE TO RESUME REGULAR WORK, HAS HE OR SHE BEEN SO ADVISED? ☐ YES ☒ NO IF YES, SHOW DATE EMPLOYEE WAS INFORMED (Mo., day, year)
17. IF EMPLOYEE IS ONLY PARTIALLY DISABLED, SHOW DATE HE OR SHE WAS ABLE TO PERFORM SOME WORK AND DESCRIBE SPECIFIC WORK RESTRICTIONS. (i.e. limitations in stooping, bending, lifting, etc.)
18. IF EMPLOYEE HAS BEEN REFERRED TO ANOTHER PHYSICIAN FOR CONSULTATION OR TREATMENT, GIVE PHYSICIAN'S NAME & ADDRESS: Dr Bruce Fahne M.D. Dr. Wariach M.D. 1999 Mowry Ave Fremont ca 94538
19. RECOMMENDATIONS AND PROGNOSIS: long term prognosis good
20. ADDRESS (Include zip code): 1999 Suite C Mowry Ave Fremont ca 94538
21. IF YOU SPECIALIZE, INDICATE SPECIALTY: neurology
22. SIGNATURE OF PHYSICIAN: C Shabbir
23. DATE OF REPORT (Mo., day, year): 3/6/95

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Form CA-20a Revised Dec. 1974

EXHIBIT 14

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed May 23 2001

On December 7, 2000, the Court issued an Order denying plaintiff's motion for reconsideration, and granting summary judgment for defendant on all claims. See Order of December 7, 2000. On the same date, the Court issued a separate judgment in favor of defendant and against plaintiff. See Judgment of December 7, 2000. On December 11, 2000 the Court received plaintiff's request for clarification of the December 7, 2000 Order, and his motion to withdraw the Judgment of the same date. This motion outlined certain claims plaintiff believed the Court had not addressed when granting summary judgment to defendant. The Court declined to withdraw the Judgment, but requested that defendant submit a response to plaintiff's filing.

The Court has now received defendant's response and, for the reasons stated below, CLARIFIES its Order of

December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiff Remigio Agustin was employed as a machinist at the Alameda Naval Aviation Depot. [1] On December 14, 1993, plaintiff sustained an on-the-job injury. Plaintiff filed a claim for Federal Employees Compensation Act (FECA) benefits on January 3, 1994. On April 20, 1994, plaintiff was granted partial benefits, and his absence from duty was approved. Plaintiff's benefits were later suspended and this remains the subject of a separate lawsuit before this Court (C-98-4418 DLJ).

On February 10, 1995, the Navy issued to plaintiff an Advance Notice of Proposed Separation from employment based on plaintiff's apparent permanent total disability and resultant unavailability for duty. On April 12, 1995, the Navy separated plaintiff from employment.

After a series of administrative actions, plaintiff filed his complaint in the instant case on December 18, 1996. In that complaint, plaintiff alleged that the Navy discriminated against him on the basis of disability, in violation of the

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[1] Plaintiff was a Machinist Supervisor II, but was downgraded, without loss of pay, to the position of Planner and Estimator (P&E) as a result of a base-wide reduction in force ("RIF") in January 1994. The downgrading of plaintiff's position was the subject of the related case of Agustin v. Dalton, C-96-2154-DLJ. The Court granted summary judgment for the defendant in that case on October 6, 1997. The Ninth Circuit has now affirmed the Court's order.

Rehabilitation Act of 1973, 29 USC Section 791 et seq., and that the Navy retaliated against him, in violation of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000e et seq. On August 9, 1999, the Court entered summary judgment against plaintiff and in favor of defendant on all claims. See Order of August 9, 1999.

On August 18, 1999, plaintiff filed a Motion for Leave to File a Motion For Reconsideration of the Court's August 9, 1999 Order. Plaintiff argued that the Supreme Court's decision in Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)—a case decided after both parties had submitted their summary judgment briefs—obligated the Court to reconsider its grant of summary judgment to defendant on the Rehabilitation Act claim. The Court construed plaintiffs motion to reconsider as a motion pursuant to Federal Rule of Civil Procedure 59(e), and ordered supplemental briefing on Cleveland from both parties. See Order of October 25, 1999. The Court received supplemental briefing, and additional filings from plaintiff which brought to the Court's attention the recent Ninth Circuit case of Barnett v. U.S. Air, Inc., 228 F.3d1105 (9th Cir. 2000). Plaintiff's motion to reconsider was denied by Order of December 7, 2000. On the same date, the Court issued judgment in favor of defendants. Plaintiff then moved this Court to withdraw the judgment, and that motion is now before the Court.

II. DISCUSSION

Plaintiff argues that the Orders of the Court granting summary judgment for defendants in this case failed to consider four claims contained in plaintiff's Complaint. Plaintiff alleges that these claims are as follows. First, that

the Navy unconstitutionally deprived plaintiff of 252.9 hours of accumulated sick leave when he was terminated, and deprived him of right to use approved, accumulated sick leave for an occupational injury. Second, that the manual and procedures the Navy employed to discipline and remove plaintiff violated plaintiff's right under the Rehabilitation Act ("the Act") not to suffer disparate treatment and disparate impact discrimination under section 504 of the Act and deprived him of the Rehabilitation Act's affirmative action protection under section 501 of the Act. Third, that the Navy violated plaintiff's Due Process rights by using his unavailability for duty while receiving FECA benefits and/or approved sick leave as a reason to terminate his employment. Fourth, that plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA.

The government makes the general response that all claims over which this Court has jurisdiction have already been adjudicated. Specifically, it argues that to the extent that plaintiff argues that the Navy should have allowed him to exhaust his accumulated sick leave as a reasonable accommodation under the Rehabilitation Act, that claim has been adjudicated. To the extent that plaintiff claims that the Navy's refusal to allow plaintiff to exhaust accumulated sick leave before terminating his employment was otherwise unlawful, plaintiff cites no statute or regulation that supports his claim. Finally, other than the Rehabilitation Act, plaintiff fails to identify an independent jurisdictional basis for this Court to consider plaintiff's loss of accumulated sick leave upon termination from employment.

A. Unconstitutional Deprivation of Sick Leave

Plaintiff first argues that this Court ignored his claim against the Navy for unlawful deprivation of some 252.9 hours of accumulated sick leave and his statutory and constitutional rights to use that leave.[2]

In his complaint, plaintiff alleges that both of these deprivations occurred as a result of the Navy denying him due process of law, i.e. terminating his employment in retaliation for his exercise of his FECA and TITLE VII rights, because he was disabled, and because of his national origin. See Complaint of December 18, 1996 ("Complaint") at 27. Therefore, in order to recover for either alleged violation of his due process rights, plaintiff must prove (1) retaliation for asserting his FECA rights or his Title VII rights, (2) a violation of the Rehabilitation Act, or (3) national origin discrimination under Title VII.

1. Retaliation for Assertion of FECA and Title VII

In Agustin v. Dalton, C-96-2154 DLJ, this Court granted summary judgment against plaintiff on his claim for retaliation based on the exercise of his rights under FECA. See Order of Oct. 6, 1997 at 5-6. In its Order of August 9, 1999, this Court explicitly found plaintiff's claim for retaliation in violation of Title VII to be without evidentiary support. Therefore, the Court finds that neither of these alleged violations could have led to an illegal deprivation of plaintiff's sick leave. See Order of Aug. 9, 1999 at 11-12.

---

[2] Plaintiff also complains that in its December 7, 2000 Order, the Court did not rule on his claim of the Navy's unconstitutional taking of his sick leave. However, a review of his December 18, 1996 complaint reveals that plaintiff never asserted such a claim against defendant. Therefore, the Court cannot adjudicate any such claim.

2. Discrimination Under the Rehabilitation Act

Plaintiff also states in his Complaint that defendant unlawfully deprived him of his sick leave by terminating him in violation of section 501 and 504 of the Rehabilitation Act. Complaint at 30.

In order to make out a prima facie case of violating the Rehabilitation Act under either sections 501 or 504, a plaintiff must show is that he was an "otherwise qualified" disabled person for the purposes of the Act. See Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990); Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987). In its Order of August 9, 1999, this Court found that "plaintiff cannot possibly show that he is an 'otherwise qualified' disabled person as required by the Rehabilitation Act." Order of Aug.9, 1999 at 7. Therefore plaintiff cannot recover for any deprivation allegedly resulting from a violation of the Rehabilitation Act.

3. Discrimination Based on National Origin

In its Order of August 9, 1999, this Court explicitly found that plaintiff's claim of national origin discrimination was without evidentiary support. See Order of Aug. 9, 1999 at 11-12. Therefore, no illegal deprivation of plaintiff's sick Leave could have occurred as the result of such discrimination.

Because all four bases for plaintiff's claim for unlawful deprivation of his sick leave have been found by this Court to be unfounded, the Court CLARIFIES its Order of December 7, 2000 to explicitly grant summary judgment against plaintiff on all his causes of action for unlawful deprivation of sick leave.

B. Whether the Manuals and Procedures Used to Terminate Plaintiff Violated Plaintiff's Rights under the Rehabilitation Act's Prohibition of Disparate Treatment.

Second, plaintiff argues that the Court failed to rule on his claim that the instructions, procedure, or manual used by the Navy to terminate him deprived him of his property interest in his employment without due process in violation of sections 501 and 504 of the Rehabilitation Act.

As previously mentioned, the Court has ruled that plaintiff has failed to demonstrate any violation of the Rehabilitation Act. Therefore, the Court CLARIFIES that its Order grants summary judgment against him for any claim that the Navy's manuals and procedures used to terminate plaintiff violated plaintiff's rights under the Rehabilitation Act's prohibition of disparate treatment.

B. Defendant's Use of Plaintiff's "Unavailability for Duty" under CPI 752 to Terminate his Employment

Third, plaintiff argues that in its December 7, 2000 Order, the Court did not address his claim that his "unavailability for duty" due to receiving FECA benefits and/or approved sick leave could not lawfully or unconstitutionally be used by the Navy to terminate his employment. In his Complaint, plaintiff alleges that two Navy regulations were improperly used to terminate his employment, CPI 752 (reasons for disciplining an employee) and CPI 339 (physical requirements of employees). Specifically, plaintiff claims that the Navy violated CPI 752 because it did not make a reasonable accommodation to him by allowing him to use his sick leave to recover from his

disability. See Complaint at 31 ("To discipline appellant simply because he is temporarily totally disabled is prohibited discrimination and cannot be supported by law or logic.").

As noted above and contrary to the assertion in his complaint, plaintiff informed defendant numerous times that he was permanently and totally disabled, not temporarily totally disabled. See Order of Aug. 9, 1999 at 7. Thus, as noted above, there was no reasonable accommodation which the Navy could have made to maintain him as an employee, including allowing him to take sick leave, as such leave would have had no effect on a permanent and total disability. Therefore, the Court finds that plaintiff has failed to demonstrate sufficient evidence of any unlawful use of CPI 752 as a violation of his Due Process rights. The Court hereby clarifies that summary judgment is entered against him and for defendant on this claim.

D. Plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA

Finally, plaintiff argues this Court failed to rule on his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA by terminating him. The Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims.

III. CONCLUSION

Having considered the parties' submission and the record in this case, the Court hereby CLARIFIES its Order of

December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000.

IT IS SO ORDERED.

Dated: May 23, 2001

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

E-32

File Number: 94544-15-1035016
ff-O

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
PO BOX 193769
SAN FRANCISCO CA 94119
Phone: (415) 975-4090/Fax: (415) 975-4853

April 13, 2001

Date of Injury: 12/14/1993
Employee: Remigio Agustin

Remigio I. Agustin
169 Austin Avenue
Hayward, CA 94544

Dear Mr. Agustin:

We have accepted your claim that you sustained an injury while in the performance of your duty as a Federal employee. The specific condition accepted is: major depression (296.2); post-traumatic stress disorder (309.81); organic brain syndrome (294.1).

Please see the enclosed letter for election of benefits, describing compensation benefits to which you are entitled.

If you have any questions concerning your case, please write or call this Office at the address shown above.

Sincerely,

Michael J. Arighi
Senior Claims Examiner

Enclosure: Guide for Injured Federal Employees

DEPARTMENT OF THE NAVY
AIR WARFARE CTR - AIRCRAFT DIV
HUM RES OFC BLDG 1489-RM 1246
22095 FORTIN RD
PATUXENT RIVER, MD 20670

E-32 E-32

E-34

4-13-01.

File Number: 94544-13-1035016
ff-O-

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
PO BOX 193769
SAN FRANCISCO CA 94119
Phone: (415) 975-4090/Fax: (415) 975-4853

April 13, 2001

Date of Injury: 12/14/1993
Employee: Remigio Agustin

Remigio I. Agustin
169 Austin Avenue
Hayward, CA 94544

Dear Mr. Agustin:

Enclosed are several letters. One explains the new conditions we have accepted, based on the recent examinations. You should show that letter to Drs. Kahlon and Chattha as authorization for treatment of the indicated accepted conditions.

The other letter is an offer of our benefits, back to 2/2/95. However, since you are currently receiving OPM benefits, we can't just start paying our benefits, as the law prohibits you from receiving both at once. You need to review that election letter and, if you want our benefits *instead* of OPM's, you need to: 1) check the box for our benefits on the CA-1105 forms attached (both copies), 2) show a date for the election (probably 2/2/95 would be most advantageous, unless you were in leave status then or some other reason of which I'm not aware), and 3) sign both copies. One is for OPM; one for our records.

I understand that you have said very specifically several times in your letters that you want to elect our benefits. However, I need that election in writing, on the CA-1105 forms, before I can proceed.

If you can return this within the next week or so, we can probably inform OPM in time to stop release of the April check and we can begin payment of our benefits, probably effective 4/1/01. Faxed copies are acceptable, followed by the originals by regular mail. Please mark the fax to my attention. As you are probably aware, we have to wait for OPM to provide us with a detailed calculation of the amount they have paid you after 2/2/95 until whenever they stop their benefits before we can pay any retroactive benefits. That information is within the control and jurisdiction of the Office of Personnel Management, a separate Federal agency over which we have no control.

I have also included a copy of the report of Dr. Lee, the neurologist, as you requested. Because of the sensitive nature of psychiatric reports, I am sending Dr. Anderson's report directly to Dr. Kahlon, who has been treating you. If you wish to discuss its contents, you should do so with him.

With acceptance of your case, my involvement in your case will cease.

Sincerely,

Michael J. Arieta
Senior Claims Examiner

DEPARTMENT OF THE NAVY
AIR WARFARE CTR - AIRCRAFT DIV
HUM RES OFC BLDG 1489-RM 1246
22095 FORTIN RD
PATUXENT RIVER, MD 20670

E-34

E-34

3-01.

E-35

5-7-01

SENT BY CERTIFIED MAIL, WITH RETURN RECEIPT REQUESTED

169 Austin Avenue
Hayward, California 94544
May 7, 2001

Department of the Navy
Air Warfare Center--Aircraft Division
Human Resources Office, Building 1489, Room 1246
22095 Fortin Road
Patuxent River, MD 20670

Ref: (a) Navy Civilian Employee: Remigio I. Agustin; SSN: 573-29-9096; Employee's OWCP Claim File No.: 94544-13-1035016

Encl: (1) Mr. Agustin's April 18, 2001 Fax/Certified mail letter to OWCP/U.S. Department of Labor, requesting leave buy-back from February 2, 1995 to April 21, 1995, the effective date of Mr. Agustin's forced, disciplinary separation from Navy federal employment, with two enclosures (Notification of Personnel Action (Effective date 04-21-95), and Leave and Earnings Statement (for the PAY PERIOD END 4-29-95)

(2) OWCP's April 20, 2001 letter to Mr. Agustin, stating that: "Leave buy back is an issue that is largely between you and your former Agency".

Dear Sir/Madam:

Mr. Agustin, the undersigned, was employed by Naval Aviation Depot, Alameda, California 94501. He was separated from Navy employment effective on April 21, 1995. See reference (a) and enclosure (1). His FECA compensation benefits were reinstated by OWCP effective from February 2, 1995 to the present. Mr. Agustin was on approved sick leave from February 2, 1995 to April 21, 1995.

Mr. Agustin, hereby requests his employing federal agency, the Navy, to exercise his constitutionally protected right or benefit to buy-back his sick leave from February 2, 1995 to April 21, 1995.

Please kindly provide and send to Mr. Agustin all the forms or information, which he needs to buy back his sick leave from 2-2-95 to 4-21-95. See enclosure (2).

Your immediate action and reply will be highly appreciated.

Sincerely, through, and with help and assistance from anonymous friends,

Remigio I. Agustin 5-7-01

REMIGIO I. AGUSTIN

E-35

E-35

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle)	2. Social Security Number	3. Date of Birth	4. Effective Date
JUSTIN REMIGIO I	573-29-9096	10-01-30	04-21-95

FIRST ACTION — **SECOND ACTION**

	5A. Code	5B. Nature of Action	6A. Code	6B. Nature of Action
	354	TERMINATION - DISABILITY		
	5C. Code	5D. Legal Authority	6C. Code	6D. Legal Authority
	AJ	5 U.S.C. 75		
	5E. Code	5F. Legal Authority	6E. Code	6F. Legal Authority

7. FROM: Position Title and Number	15. TO: Position Title and Number
PLANNER AND ESTIMATOR (A/C MACHINIST ODOPH75000	

8. Pay Plan	9. Occ. Code	10. Grade/Level	11. Step/Rate	12. Total Salary	13. Pay Basis	16. Pay Plan	17. Occ. Code	18. Grade/Level	19. Step/Rate	20. Total Salary/Award	21. Pay Basis
WD	3414	08	00	$28.47	PH						

22. Basic Pay	23. Locality Adj.	24. Adj. Basic Pay	25. Other Pay	26. Basic Pay	27. Locality Adj.	28. Adj. Basic Pay	29. Other Pay
$28.47	$ 0	$28.47	$ 0				

14. Name and Location of Position's Organization	30. Name and Location of Position's Organization
DIRECTOR OF PRODUCTION SUPPORT/PRD SUP P-3 WEAPON SYSTEM ENGINEERING DIVISION SOFTWARE SUPPORT BRANCH NADEP ALAMEDA, ALAMEDA, CA 94501	

EMPLOYEE DATA

1. Veterans Preference	34. Tenure	35. Agency Use	36. Veterans Preference for RIF
2	1		X YES NO

37. FEGLI	38. Annuitant Indicator	39. Pay Rate Determinant
Z BASIC LIFE PLUS ADDL OPT W/3 TIMES Z PAY & STD OPT & FAMILY OPT	9 NOT APPLICABLE	A

40. Retirement Plan	41. Service Comp. Date (Leave)	42. Work Schedule	43. Part-Time Hours Biweekly Pay Period
1 CSRS	09-13-68	F FULL TIME	

POSITION DATA

44. Position Occupied	45. FLSA Category	46. Appropriation Code	47. Bargaining Unit Status
1	N		0460

48. Duty Station Code	49. Duty Station (City - County - State or Overseas Location)
06-0010-001	ALAMEDA CA

50. AGENCY DATA	51. UIC:	52. ORG CODE:	53. COST CNTR:	54. PAYROLL OFF ID: 38010
	65885	05240	06833	LOC ID: 8864-018930

55. Remarks

FORWARDING ADDRESS: 169 AUSTIN AVE H HAYWARD,CA 94544
REASON(S) FOR TERMINATION: UNAVAILABILITY FOR DUTY
LUMP-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE.
SF 2819 WAS PROVIDED. LIFE INSURANCE COVERAGE IS EXTENDED FOR 31 DAYS DURING
WHICH YOU ARE ELIGIBLE TO CONVERT TO AN INDIVIDUAL POLICY (NONGROUP CONTRACT)

E-37 E-37

~~ENCL (1)~~ ENCL (1)
2 of 3

56. Employing Department or Agency	58. Signature/Authentication and Title of Approving Official
DEPT OF THE NAVY	HEAD, EMPLOYEE RELATIONS BRANCH

57. Agency Code	58. Personnel Office ID	59. Approval Date	
NV19	2370	04-17-95	SRD

Editions Prior to 7/91 Are Not Usable After 6/
NSN 7540-01-37

EXPLANATION FOR CHANGES FOR TAX YEARS 1996, 1997, 1998, 1999, AND 2000

169 Austin Avenue
Hayward, California 94544
July 3, 2001

Internal Revenue Service Center
Fresno, California 93888

Encl: (1) Office of Personnel Management (OPM) letter dated May 30, 2001

(2) OPM letter dated May 1, 2001

(3) U.S. Department of Labor (DOL) letter dated April 13, 2001 concerning acceptance of FECA claim.

(4) DOL letter also dated April 13, 2001 explaining FECA compensation benefits.

(5) 1996, Form 1040 Income Tax Return

(6) 1996 Income Tax Examination Changes

Dear Sir/Madam:

The undersigned, Mr. Remigio I. Agustin, sustained an on-the-job injury on December 14, 1993 as a federal employee, and he timely filed a FECA compensation claim. He was removed from federal employment in April 1995. His OPM application for disability retirement annuity was approved in February 1996, with his annuity retroactive from April 1995. For the years 1996 to 2000, he received the following OPM disability retirement annuity:

1996	$41,697.57 (includes annuity from April 1995)
1997	$26,724.00
1998	$27,276.00
1999	$27,624.00
2000	$28,284.00

On April 13, 2001, his FECA compensation benefit was granted by the U.S. Department of Labor (DOL), with his FECA compensation retroactive from February 1995 to present. See enclosures (3) and (4). He elected to receive FECA compensation, and DOL paid in full the total disability retirement annuity he received from OPM from April 1995 through April 2001. See enclosures (1) and (2).

(In his original 1996, Form 1040 tax return, his taxable income was $39,975.98 and his tax was $5, 996.00. After he was audited in May 1998, his corrected taxable income was $43, 986 and his corrected tax was $7,100.00. He is providing enclosures (5) and (6) as additional information).

Because of the April 13, 2001 award of his FECA compensation, and because all his OPM disability retirement annuity which he received from 1996 to April 2001 has been paid in full by DOL, Mr. Agustin is filing five (5) Tax Form 1040X to amend his tax returns for the tax years 1996 through 2000.

In case you need additional information or have any questions, please kindly feel free to call the undersigned at (510)-786-2819.

Your immediate action and reply is very highly appreciated.

Keep up the good works you provide to our taxpayers, and May God Bless You Always! Thanks!

Sincerely, through, and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN
SSN 573-29-9096

United States
Office of
Personnel Management Washington, DC 20415-0001

Remigio L. Augustin
CSA 3655162
OWCP#13 1035016
May 30, 2001

Employment Standards Administration
Office of Worker's Compensation Programs
PO Box 193769
San Francisco, CA 94119

COPY FOR YOUR INFORMATION

Dear OWCP:

We are happy to inform you that your overpayment in the amount $163,800.57 has been paid in full, and your account is closed.

Thank you for your cooperation in settling this matter.

Sincerely,

Charlene O. Quick
Receivables Management Branch
Financial Management Division
(202) 606-1416

cc: Remigio L. Augustin
169 Austin Avenue
Hayward, CA 94544

E-47

E-47

E-48

United States
Office of
Personnel Management Washington, DC 20415-0001

Date: May 1, 2001
Case Name: Remigio L. Agustin
Claim Number: 13 1035016

CSA Number: A3655162

Employment Standards Administration
Office of Worker's Compensation
PO Box 193769
San Francisco CA 94119

COPY FOR YOUR INFORMATION

Dear OWCP:

The purpose of this letter is to advise you that the above-named civil service annuitant has elected to receive compensation benefits and has been dropped from our rolls. Therefore, we request recovery of the benefits paid from the Retirement Fund for the period of time, which will also be covered, by OWCP benefits.

The dual service coverage began on **April 18, 1995** and ended on **April 30, 2001**. The annuity paid for this period totals **$163,800.57** in civil service benefits. Any applicable deductions for health and/or life insurance benefits would have covered this same time period.

Please arrange for the issuance of a check in the amount of **$163,800.57**, made payable to the U.S. Office of Personnel Management. Use the annuitant's name and Civil Service Retirement claim number when making remittances so that we may credit the proper account. Forward the check directly to:

Office of Personnel Management
Civil Service Retirement System
P.O. Box 7125
Washington, D.C. 20044

If there is some reason that payment is not possible at this time, please contact me at (202) 606-1416. Thank you for your cooperation in this matter.

Sincerely,

Charlene O. Quick
Financial Technician
Receivables Management Branch

E-48

FFS-AR 021 E-48

Department of the Treasury
Internal Revenue Service

E-49

K-8-7-01

FRESNO, CA 93888

In reply refer to: 8987308833
Aug. 03, 2001 LTR 105C
573-29-9096 199612 30

00495

7001 0360 0000 2624 0302

REMIGIO I & NENITA D AGUSTIN
169 AUSTIN AVE
HAYWARD CA 94544-8502694

CERTIFIED MAIL

Taxpayer Identification Number: 573-29-9096
Kind of Tax: 1040
Amount of Claim(s): $ 7,100.00 3,266.00

Date Claim(s) Received: July 10, 2001
Tax Period(s): Dec. 31, 1996 Dec. 31, 1997

Dear Taxpayer:

This letter is your legal notice that we have disallowed your claim(s). We can't allow your claim(s) for refund or credit for the period(s) shown above for the reason(s) listed below.

You filed your claim for credit or refund more than 3 years after the return due date, including any filing extension you requested for this return. The law states that we can't refund or credit tax to you if you paid it more than 3 years before the date you filed the claim. We consider withheld tax, estimated tax, or earned income credit as paid on the return due date.

You may appeal our decision if we disallowed your claim because it was filed late. Generally, we consider a claim late if it was filed 3 years after the return was due or if it was filed more than 2 years after the tax was paid. The Appeals Office can't change the amount of time which is allowed by law to file a claim for refund or credit. Your appeal of our decision should provide us with an explanation of why you believe your claim was filed on time (such as, you had an extension of time for filing). NOTE: Reasonable cause or similar explanations can't change the time limits set by the law.

If you want to appeal our decision to disallow your claim, you must provide a brief written statement of the issues you don't agree with. The facts contained in the written statement should be detailed and complete, including names, amounts, locations, etc.

E 49
~~ENCL (1)~~
~~(1 of 3)~~

You should include the following:

1. A statement that you want to appeal the disallowance.

E-49

Department of the Treasury
Internal Revenue Service

E-50

8987308833
Aug. 03, 2001 LTR 105C
573-29-9896 199612 30
00496

REMIGIO I & NENITA D AGUSTIN
169 AUSTIN AVE
HAYWARD CA 94544-8502694

2. Your name, address, and a telephone number where you can be contacted during the day.

3. A statement of facts supporting your reasons for disputing the disallowance.

4. A statement outlining the law or other authority that supports your claim.

You must declare that the statement of facts is true under penalties of perjury. You may do this by adding the following statement and signing it:

"Under penalties of perjury, I declare that the facts presented in my written appeal are, to the best of my knowledge and belief, true, correct, and complete."

An attorney, certified public accountant, or person enrolled to practice before the Internal Revenue Service may represent you. To have someone represent you, attach Form 2848, Power of Attorney and Declaration of Representative, (or similar written authorization) to your written statement.

If your authorized representative prepares the written statement, he or she should include a declaration stating that he or she prepared the written statement and accompanying documents and whether he or she knows personally that the protest and accompanying documents are true and correct.

Please mail your request for an appeal to the address shown on this letter.

If you want to sue to recover tax, penalties, or other amounts, you may file a lawsuit with the United States District Court having jurisdiction or with the United States Court of Federal Claims. These courts are independent bodies and have no connection with the Internal Revenue Service.

The law permits you to do this within 2 years from the mailing date of this letter. If you decide to appeal our decision first, the 2-year period still begins from the mailing date of this letter. However, if you signed an agreement that waived your right to the notice of disallowance (Form 2297), the period for filing a lawsuit began on the date you filed the waiver. E-50

E-50

~~ENCL. (1~~
~~(2 of 3)~~

If you have any questions, please call M Ross 51 at

Department of the Treasury
Internal Revenue Service

E-51

8987308833
Aug. 03, 2001 LTR 105C
573-29-9096 199612 30
00497

REMIGIO I & NENITA D AGUSTIN
169 AUSTIN AVE
HAYWARD CA 94544-8502694

559 443-7537 between the hours of 7 am and
2 pm. If the number is outside your local calling area,
there will be a long-distance charge to you.

If you prefer, you may write to us at the address shown at the top
of the first page of this letter.

Whenever you write, please include this letter and, in the spaces
below, give us your telephone number with the hours we can reach you.
Also, you may want to keep a copy of this letter for your records.

Telephone Number ( ) (510)-786-2819 Hours 9AM To 5PM

Sincerely yours,

R. Hon

R. HON
FIELD DIRECTOR, COMPLIANCE SVCS.

Enclosure(s):
Publication 1

E-51

E-51

~~Encl (1)~~
~~(3 pgs)~~

SENT BY CERTIFIED MAIL, WITH RETURN RECEIPT REQUESTED

169 Austin Avenue
Hayward, California 94544
August 8, 2001

Department of the Treasury
Internal Revenue Service
Fresno, California 93888

Encl: (1) 8987308833; Aug. 03, 2001 LTR 105C; ...19961230; IRS letter/legal notice to Remigio I. & Nenita D. Agustin dated Aug. 3, 2001, which disallowed claims for refund for Tax periods December 31, 1996 ($7100.00) and December 31, 1997 (the refund claim for 1997 is for $2682.50, not $3266.00).

Dear Sir/Madam:

1. Please take notice that the undersigned taxpayers, Remigio I. Agustin and Nenita D. Agustin, want to appeal the disallowance of their claims in enclosure (1) above.

2. Names: Remigio I. Agustin
Nenita D. Agustin

Address: 169 Austin Avenue, Hayward, California 94544

Telephone Number: (510)-786-2819

3 Statement of facts supporting taxpayers' reasons for disputing the disallowance:

a. On December 14, 1993, Mr. Remigio I. Agustin, a Navy civilian federal employee, sustained an on the job injury. Mr. Agustin timely filed a Federal Employees Compensation Act (FECA) claim based on his 12-14-93 work injury to the U.S. Department of Labor (DOL).

b. In April 1995, Mr. Agustin was separated from his Navy civilian federal employment.

c. In February 1996, Mr. Agustin's disability retirement application was granted by the Office of Personnel Management (OPM), with his disability retirement annuity retroactive from April 1995. (Mr. Agustin received disability retirement annuity until April 2001.) For the years 1996 to 2000, he received the following OPM disability retirement annuity:

1996	$41,697.57 (includes annuity from April 1995)
1997	$26,724.00
1998	$27,276.00
1999	$27,624.00
2000	$28,284.00

d. In April 1997, Mr. and Mrs. Agustin timely filed their 1996 joint, federal

income tax return. Similarly, in April 1998, they timely filed their 1997 joint, federal income tax return. Mr. Agustin included the OPM disability retirement annuities he received for 1996 and 1997 as taxable income in their 1996 and 1997 tax returns.

e. On April 13, 2001, the U.S. Department of Labor (DOL) granted his FECA compensation benefits, with his FECA compensation retroactive from February 1995 to present. Based on the DOL's FECA compensation award, he elected to receive FECA compensation, and DOL paid in full the total disability retirement annuity he received from OPM from April 1995 through April 2001.

f. In a May 30, 2001 letter, OPM informed DOL, with a copy to Mr. Agustin, that his overpayment or the total amount of disability retirement annuity he received from April 1995 to April 2001, in the amount of $163, 800.57, has been paid in full. His election of FECA compensation for the said period created an overpayment because of dual coverage of OPM's Disability Retirement and FECA compensation, and DOL paid in full the total amount of OPM disability retirement annuity Mr. Agustin has received from April 1995 to April 2001 from Mr. Agustin's FECA compensation award.

g. In a July 3, 2001 letter, based on DOL's April 13, 2001 decision and the total payment in full of his OPM disability retirement annuities which he received for the years 1996 through 2000, Mr. and Mrs. Agustin filed amended tax returns (Form 1040X) for Tax Years 1996, 1997, 1998, 1999, and 2000, to claim refunds of their overpaid taxes for the said years because his FECA compensation are not taxable. The IRS received these amended tax returns, by registered mail with return receipt requested, on July 10, 2001.

h. In a August 3, 2001 notice (enclosure (1)), the IRS informed them that their claims for Tax Years 1996 and 1997 have been disallowed because such claims were "filed late", and hence, this appeal follows.

4. Statement outlining the law or other authority that supports taxpayers' claims:

First, the U.S. Court of Appeals for the Federal Circuit instructs that "a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action", see Hopland Band of Pomo Indians v. United States, 855 F. 2d 1573, 1577 (Fed. Cir. 1988), at which time "'the plaintiff has a legal right to maintain his or her action.'" Catawba Indian Tribe of S. C. v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (quotation omitted). The "proper focus for statute of limitations purposes, 'is upon the

> time of the [defendant's] acts, not upon the time at which the consequences of the acts became most painful.'" Fallini v. United States, 56 F. 3d 1378, 1383 (Fed. Cir. 1995) (quoting Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). However, "'a claim does not accrue unless the claimant knew or should have known that the claim existed.'" Hopland Band, 855 F. 2d at 1577 (quoting Kinsey v. United States, 852 F. 2d 556, 557 n. * (Fed. Cir. 1988)).

Here, the taxpayers' claims first accrue, on April 13, 2001, when DOL granted his statutory right to the payment of money under the FECA. Prior to April 13, 2001, they did not know, and they could not have known that they have such claims. Or in the alternative, their claims first accrue on May 30, 2001, when OPM informed Mr. Agustin that his OPM disability retirement annuities, which he had received for the period from April 1995 to April 2001 has been paid in full by DOL from his FECA compensation award. They do not have a legal right and were not entitled to institute an action to file refund claims for 1996 and 1997 until after DOL paid in full Mr. Agustin's 1996 and 1997 disability retirement annuities from Mr. Agustin's FECA compensation award. Based on these facts and the above controlling authorities, their claims should be granted.

Second, even assuming arguendo, just for the sake of argument, that the taxpayers' claims were filed late, the doctrine of equitable tolling excuses the taxpayers' failure to comply with the statute of limitations. As a prerequisite to obtaining such relief, "plaintiff must show either that defendant has concealed its act with the results that plaintiff was unaware of the existence of a cause of action or **that the nature of plaintiff's injury was such that it was inherently**

unknowable at the time the cause of action accrued." Wilcox v. United States, 3 Cl. Ct. 83, 85 (1983) (bold and underline added). Also see Japanese War Notes Claimants Ass'n. v. United States, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967).

Here, there is no question at all that the taxpayers' injury was inherently unknowable. The taxpayers, Mr. and Mrs. Agustin, were not aware of a possible claim and cause of action until after April 13, 2001, when the DOL granted Mr. Agustin's FECA compensation retroactive from February 1995 to present. And even with the DOL's April 13, 2001 grant of Mr. Agustin's FECA compensation, they did not have a legal right to maintain a cause of action until after the DOL paid in full, Mr. Agustin's OPM disability retirement annuity payments for 1996 and 1997. They could not file a legally valid claim with the IRS until after DOL has paid in full Mr. Agustin's 1996 and 1997 disability retirement annuities. Based on OPM's May 30, 2001 letter, which has established that Mr. Agustin was on FECA compensation for tax years 1996 and 1997, they became aware that Mr. Agustin has a statutory right to non-taxable FECA compensation for the years 1996 and 1997, that they have a legally valid cause of action, and they filed their claims. Based on all the foregoing, the doctrine of equitable tolling applies in this case, and their claims should be granted.

Third, another reason why their refund claims for 1996 and 1997 should be granted is because 26 USC Section 6511 is unconstitutional because it applies unfairly to FECA compensation recipients. Or in the alternative, as applied to the facts in the instant case, the application of 26 USC 6511 against Mr. Agustin, violated his constitutional right to equal protection of the laws under the equal protection component

of our U.S. Constitution's Fifth Amendment, and their 1996 and 1997 refund claims should be granted.

All FECA compensation recipients are similarly situated, disabled persons, and they all have the same fair and equal, statutory rights to a no "fault" benefits under FECA (see Weyerhauser, 372 U.S., at 601) and to a non-taxable FECA compensation under 26 USC Section 104(a)(1). However, 26 USC Section 6511 applies unfairly to them because, for reasons beyond their fault or control, some recipients could enjoy and exercise such statutory rights and some could not.

"The Act [FECA]...is essentially an act of justice...designed to compensate, promptly, without litigation or expense, all employees injured while in discharge of duty". Dahn v. Davis, 258 U.S. 421, 431 (1922), (bold and underline added). "The legislative history of the Federal Employees' Compensation Act...shows that the concern of Congress is to provide federal employees a swift, economical, and assured right of compensation for injuries arising out of the employment relationship regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States." Weyerhaeuser S. S. Co. v. U.S., 372 U.S. 597, 601 (1963), (bold and underline added). Under FECA, "employees are guaranteed the right to receive immediate, fixed benefits". Lockheed Aircraft Corp. v. U.S., 460 U.S. 190, 194 (1983), (bold and underline added). Part of that constitutionally protected benefits are statutory rights to a no "fault" FECA statutory scheme, to a tax-free, FECA compensation, and to a prompt, swift, or immediate FECA benefits.

Although 26 USC Section 6511 "establishes no explicit classification and does not expressly distinguish

between claimants [or FECA compensation recipients]" (Logan, at 1159), our federal government's interpretation and/or application of this statute through its "established [federal] procedures" (Logan, at 1158), as what had happened to the taxpayers in the instant case, "unambiguously divides…claimants [or FECA compensation recipients]…into two discrete groups that are accorded radically disparate treatment" (Logan, at 1159)--those FECA compensation recipients who **could** enjoy and exercise their statutory right to non-taxable FECA compensation, and those who **could not** exercise such right. See Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1158, 1159 (1982) (Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR join). " The government's application of 26 USC Section 6511 against Mr. Agustin had very clearly violated our U.S. Constitution's Equal Protection requirement that "all persons similarly situated…be treated alike". Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

Here, the government could never use a "rational basis" defense for violating FECA compensation recipients' statutory rights and their equal protection-constitutional right. Here, the government could never successfully argue that the government's obliteration of FECA compensation recipients' statutory and constitutional rights "classify the persons it affects in a manner rationally related to legitimate government objectives". Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

As applied to the facts in the instant case, the application of 26 USC 6511 against the taxpayers, Mr. and Mrs. Agustin, violated Mr. Agustin's constitutional right to equal protection of the laws under the Equal Protection component of our U.S. Constitution's Fifth Amendment, and

the disallowance of their 1996 and 1997 refund claims was void ab initio and/or unconstitutional.

Fourth, the IRS' August 3, 2001 disallowance of the taxpayers' claims was void ab initio and/or unconstitutional because it violated our U.S. Constitution's protections from deprivation of property without due process and from unconstitutional taking of property without just compensation.

Here, there is no question that based on DOL's April 13, 2001 award of FECA compensation and DOL's payment in full of all of Mr. Agustin's disability retirement annuities, he has a constitutionally protected, property interest to a federal tax free-FECA compensation from February 1995 to the present. Here, "it is the [federal] system itself that destroys a complainant's property interest, by operation of law, whenever the [federal government] fails" to grant such complainant's FECA compensation award in a timely manner within 26 USC Section 6511's statute of limitations. See Logan, id., at 1158. Such a system unconstitutionally deprived Mr. Agustin of his property interest.

Furthermore, Mr. and Mrs. Agustin, present and submit that the IRS' disallowance of their refund claims for 1996 and 1997 was an unconstitutional taking of their property--Mr. Agustin's right or interest to a tax-free FECA compensation pursuant to 26 USC Section 104(a)(1)--without just compensation. After DOL's full payment of all of Mr. Agustin's OPM disability retirement annuities from his FECA compensation award sometime on or before May 30, 2001, Mr. Agustin's statutory right and property interest to a tax-free FECA compensation has been established. Our U.S. Constitution is the supreme law of the land, and when a federal statute's (26 USC Section 6511's) application Is

inconsistent with our U.S. Constitution's provisions, our Constitution must, and always, prevails. Therefore, the IRS' August 3, 2001 disallowance notice unconstitutionally took away his property interest in violation of our U.S. Constitution's Taking Clause provision.

Because of the unconstitutional deprivation of Mr. Agustin's property interest and/or its unconstitutional taking by the government without just compensation, the IRS' 8-3-01 disallowance notice was void ab initio and/or unconstitutional.

Based on any one or all of the above reasons, Mr. and Mrs. Agustin's refund claims for 1996 and 1997 should be granted.

Under penalty of perjury under the laws of the United States, the undersigned taxpayers, Mr. Remigio I. Agustin and Mrs. Nenita D. Agustin, hereby declare that the facts presented in this appeal are, to the best of their knowledge and belief, true, correct, and complete.

Your immediate action and reply, and your help and assistance to our taxpayers, are very highly appreciated. May the Lord our God Bless You Always!!!

Sincerely, through, and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN

/s/ NENITA D. AGUSTIN
NENITA D. AGUSTIN

Department of the Treasury
Internal Revenue Service

E-58

FRESNO, CA 93888

In reply refer to: 8987308833
Aug. 27, 2001 LTR 3064C
573-29-9096 199612 30
10159

REMIGIO I & NENITA D AGUSTIN
169 AUSTIN AVE
HAYWARD CA 94544-8502694

Taxpayer Identification Number: 573-29-9096
Tax Period(s): Dec. 31, 1996 Dec. 31, 1997

Form: 1040X

Dear Taxpayer:

Thank you for the inquiry of Aug. 08, 2001.

The information you submitted does not serve to change the requirements of Internal Revenue Code Section 6511; which stipulate that, in order to receive a refund, a claim must be filed within three years of the date of the original return or two years of the the date of payment of the tax, whichever is later.

If you still disagree with our determination, you will need to file suit for refund in the United States District Court within two years of the date of our original disallowance.

If you have any questions, please call M Ross 51 at 559 443-7537 between the hours of 7 am and 2 pm. If the number is outside your local calling area, there will be a long-distance charge to you.

If you prefer, you may write to us at the address shown at the top of the first page of this letter.

Whenever you write, please include this letter and, in the spaces below, give us your telephone number with the hours we can reach you. Also, you may want to keep a copy of this letter for your records.

Telephone Number ( )_____ Hours_____

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Department of the Treasury
Internal Revenue Service

833

159

8987308833
Aug. 27, 2001 LTR 3064C
573-29-9096 199612 30

10160

RENIGIO I & NENITA D AGUSTIN
169 AUSTIN AVE
HAYWARD CA 94544-8502694

We apologize for any inconvenience we may have caused you, and thank you for your cooperation.

Sincerely yours,

Jerome O. Express

DEROME O. EXPRESS
CHIEF, EXAMINATION BRANCH

ee Enclosure(s):
e Copy of this letter

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U. S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
P.O. Box 5749
San Francisco, CA 94119
(415) 744-6610

April 20, 1994

File Number: 94544-13-1035016
Data of Injury: December 14, 1993
Employee: Remigio Agustin

Remigio I. Agustin
169 Austin Avenue
Hayward, CA 94544

Dear Mr. Agustin:

I am writing in reference to your claim for the injury of the above date, which you sustained while employed by the agency identified below. Your claim is accepted for cervical and lumbar strain, and lumbosacral contusion

The Federal Employees' Compensation Act (the FECA) provides for payment of appropriate medical expenses related to your injury following proper submission of charges to this office. Because the issues of your continuing disability for all work and whether a head injury was sustained remain unresolved, your claims for compensation remain unpayable at this time. Your agency has covered part of this ongoing absence from work through continuation of pay (COP). You are required by law to return to work as soon as you recover from the effects of the injury, or as soon as your employer identifies a job suitable to your medical limitations.

The records of Dr. Chattha relate that you were previously treated for headaches in 1992. Please provide a detailed description of this treatment, or any other similar condition or injury sustained prior to this injury, including all relevant medical records. You should identify the physician and the time period that you received such treatment.

Physical therapy as prescribed by your treating physician, Dr. Porciuncula, is authorized, to a maximum period of 90 days following the injury. The referral to Dr. Chattha is retroactively authorized, and his billing should be forwarded to this Office for payment.

cc: Department of the Navy
Naval Aviation Depot
Workers Comp Code 09252
Naval Air Station
Alameda, CA 94501

cc: Dr. Generoso P. Porciuncula, MD
St. Rose Medical Square
27171 Calaroga Avenue, Suite 2
Bayward, CA 94545

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A12

12b

E-60

Payment for physical therapy services beyond the 90 day period will require additional medical ju ification from your physician, including diagnosis, functional deficits, goals, duration and frequency of treatment, and treatment modalities. The prescription must describe the types of treatment to be rendered, and the objectives to be attained.

Also, Computerized Tomography (CT) or Magnetic Resonance Imaging (MRI) scans are authorized for the condition noted on the first page, if deemed medically necessary by your treating physician.

Please show this letter to medical providers, including physical therapists, so they will not need to telephone our Office for Treatment-authorization.

Enclosed is a notice entitled "Now That Your Claim Has Been Accepted..." which provides information concerning payment of bills, claims for compensation, and other matters pertinent to your claim.

TO EMPLOYER: Please provide a completed Form CA-3 showing the dates the employee lost time from work.

Sincerely,

M. E. HUMMER
CLAIMS EXAMINER

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~~A125~~

E-62

APPLICATION FOR LEAVE

INSTRUCTIONS: Please complete Items 1–4 after reading the Privacy Act Statement shown below.

1. Name (First or type—Last, First, MI): AGUSTIN, REMIGIO I.
2. Employee I.D. Number: 15 53
3. Organizational Unit
4. From: Month 01 Day 23 Hour 0615 A.M./P.M.
4-A. To: Month Day Hour A.M./P.M. (UNTIL FURTHER NOTICE)
4-C. Total Number of Hours
5. I hereby request (If more than one box is checked, applies in Item 6, Remarks):
- [ ] Annual Leave. (Annual leave requested may not exceed the amount available for use during the leave year.)
- [X] Sick Leave. (Complete reverse side of form.)
- [ ] Leave Without Pay.
- [ ] Compensatory Time.
- [ ] Other. (Specify)

6. Remarks: PLEASE CANCEL LAST APPLICATION FOR LEAVE RECEIVED LWOP. REQUEST SICK LEAVE DUE TO OCCUPATIONAL INJURY
7. Employee's Signature: Remigio I. Agustin
8. Date: 2-16-95

OFFICIAL ACTION ON APPLICATION

- [X] Approved
- [ ] Disapproved (If disapproved, give reason. If an annual leave, continue action in remarks.)

Signature, Annual leave requested may not exceed the amount available for use during the leave year.: B. Sidayan
Date: 2/28/95

NSN 7540-00-753-3047

Please detach this section before submitting SF 71.

PRIVACY ACT STATEMENT

Section 6311 of Title 5 to the U.S. Code authorizes collection of this information. The primary use of this information is by management and your payroll office to approve and record your use of leave. Additional disclosures of the information may be: To the Department of Labor when processing a claim for compensation regarding a job connected injury or illness; to a State unemployment compensation office regarding a claim; to Federal Life Insurance or Health Benefits carriers regarding a claim; to a Federal, State, or local law enforcement agency when your agency becomes aware of a violation or possible violation of civil or criminal law; to a Federal agency when conducting an investigation on you for employment or security reasons; to the Office of Personnel Management or

(Continued on Reverse)

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E-62 3

~~EXH K~~

~~EXH (4)~~

United States District Court
for the Northern District of California

REMIGIO I. AGUSTIN,
Plaintiff,

v.

JOHN H. DALTON, Secretary,
Department of the Navy,
Defendant.

No. C-96-4527 DLJ

ORDER
Filed Jun 08 2001

On May 31, 2001, the Court received plaintiff's ex parte motion for leave to alter or amend the judgment in the instant case. The Judgment was issued on December 7, 2000. On the same date, the Court issued an Order denying plaintiff's motion for reconsideration, and reiterating its earlier grant of summary judgment to defendant. See Order of December 7, 2000; Order of August 9, 1999. By the instant motion, plaintiff presents two matters he believes merit the Court's attention. For the reasons stated below, the Court DENIES plaintiff's ex parte motion.

I. DISCUSSION

1. The Affirmative Action Claim

Plaintiff first states that he believes the Court has not explicitly ruled on his "distinct and separate affirmative action accommodation claim pursuant to 29 USC Section 791." Mot. Of May 31, 2001 at 1. Plaintiff submits that:

> [t]he standard a party must meet to establish a violation of Section 501 [of the Rehabilitation Act, codified at 29 USC Section 791], especially when the requested affirmative action accommodation does not involve an employee's ability to function on the job or the facilitation of employment tasks, is not the same as in Section 504 [of the Rehabilitation Act, codified at 29 USCV 794] because it is well established that Section 501 provides greater protection and imposes [] even greater duties and obligation upon federal agencies to take affirmative action to accommodate federal employees who are "individuals with disabilities."

Ex parte Motion at 2. This passage indicates that plaintiff believes that Section 501 of the Rehabilitation Act affords employees of the government more protection than Section 504. The Court need not reach this issue, as Section 501—whatever its scope of protection relative to Section 504—does not provide relief to plaintiff.

Under Section 501, codified at 29 USC Section 791, the duty of federal employers "goes beyond mere nondiscrimination" to an "affirmative obligation to accommodate." Buckingham v. U.S., 998 F.2d 735, 739 (9th Cir. 1993). This obligation to accommodate means that "[a]n agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on

the operation of its program." Id. (quoting 29 C.F.R. Section 1613.704(a)) (emphasis added).

The Court has made clear in previous Orders that plaintiff has not presented a genuine issue of material fact that he is a "qualified handicapped...employee" or an "otherwise qualified" disabled person. See Order of August 9, 1999 at 6-10; Order of December 7, 2000 at 4, 6-11; Order of May 23, 2001 at 6. The regulations define "Qualified Handicapped" individuals as those who, with or without reasonable accommodation, can perform the essential functions of their job. See Buckingham, 998 F.2d at 740 (citing 29 C.F.R. Section 1613.702(f)). Based on plaintiff's repeated statements that he was totally and permanently disabled, the Court concluded that plaintiff could not and would never be able to perform the essential functions of his job. See Order of August 9, 1999 at 6-10; Order of December 7, 2000 at 4, 6-11; Order of May 23, 2001 at 6. Plaintiff is therefore not entitled to relief under 29 USC Section 791, whether the claim is construed as a "separate and distinct affirmative action claim," as described by plaintiff, or otherwise.

2. The Claim Pursuant to 5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)

Plaintiff also requests that the Court alter its judgment with respect to his claim that the Navy's denial of paid sick leave violated the above-cited laws. The Court has reviewed plaintiff's Complaint in this case, and finds that plaintiff never alleged a cause of action under these statutes and regulations. See Complaint of December 18, 1996. Because the Court and defendant were not apprized of this claim, and because the Court believes that amendment of the

Complaint at this late juncture—more than four years after the inception of the suit—would prejudice defendant, plaintiff may not now seek relief pursuant to these statutes and regulations.

II. CONCLUSION

The Court DENIES plaintiff's ex parte motion for leave to alter or amend the judgment in this case. The Judgment of December 7, 2000 stands.

IT IS SO ORDERED

Dated: June 8, 2001

/s/D. Lowell Jensen
D. Lowell Jensen
United States District Judge

AGUSTIN'S QUITE RELEVANT OUTSTANDING MOTIONS

(Note: The following are Agustin's quite relevant "outstanding" motions, which would affect the outcome of Agustin's claims, and which should have been granted by the Claims Court because justice so requires. These quite relevant, "outstanding" motions were summarily denied by the Claims Court in its 9-5-03 Order, at 6, without any discussion of the merits, or the merits issues, of each motion, in violation of Agustin's Due Process right to be heard and to a fair and full hearing or briefing.)

Date of filing	Docket Entry No.	Motion title or purpose
07/31/2001	21	**Motion to amend** to add or include Agustin's 448 sick leave hours (part of CLAIM 1), based on the DOL's 4-13-01 grant of Agustin's FECA compensation retroactive to 2-2-95; see App. E-34.
08/31/2001	27	**Motion to amend** to include Agustin's 1996 and 1997 tax refund claims (CLAIM 5), based on the IRS' 08/27/2001 denial of Agustin's 1996 and 1997 tax refund claims; see App. E-58 to E-59. This claim has a ***quite distinct and quite different*** statutory foundation—the IRS' violation of Agustin's federal statutory right pursuant to 26 USC Section 104(a)(1), and which is

		justiciable and remediable in the Claims Court pursuant to 28 USC Section 1346(a)(1) or 28 USC Section 1491(a).
02/27/2003	46	MOTION TO SUPPLEMENT THE RECORD IN THE INSTANT CASE BASED ON OUR U.S. SUPREME COURT'S RECENT REANNOUNCEMENT OF: (1) ITS "CLEARLY ESTABLISHED PRECEDENTS"-CASE LAW IN EARLY V. PACKER, [123 S.CT. 362, 365 (2002)], U.S. NO. 01-1765 (11-4-02), AND (2) ITS FEDERAL AGENCY ACTION IN VIOLATION OF "ANY LAW"—SUCH ACTION MUST BE SET ASIDE-CASE LAW IN FCC V. NEXT WAVE PERSONAL COMMUNICATIONS, INC., [123 S.CT. 832, 838 (2003)], U.S. NO. 01-653 (1-27-03); see App. K-1 to K-7.
03/14/2003	48	White Mountain Motion or MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S (1) REANNOUNCEMENT OF ITS TUCKER ACT JURISDICTION-CASE LAW AND (2) ITS ANNOUNCEMENT OF ITS NEW "FAIR INTERPRETATION" RULE OR "FAIR INFERENCE" CASE-

		LAW IN UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE, [123 S.Ct. 1126 (2003]"; see App. M-1 to M-7.
03/31/2003	55	Brown Motion or "MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S REANNOUNCEMENT OF ITS FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE-CASE LAW IN BROWN V. LEGAL FOUNDATION OF WASHINGTON, [122 S.Ct. 1406 (2003)]"; see App. O-1 to O-9.
04/09/2003	58	"04/09/2003 Motion" or "MOTION FOR LEAVE TO FILE THIS SUPPLEMENTAL PLEADING IN RESPONSE TO: DEFENDANT'S "SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS", which was filed on 04/09/2003, Docket Entry No. 58; see Informal Brief, at App. BB-17.
05/06/2003	66	**Motion to Amend** to include CLAIMS 9 and 10, based on our U.S. Supreme Court's quite recent announcement, or reannouncement, or clarification of its constitutionally protected speech-case law in Virginia v. Black, 123 S.Ct. 1536 (2003) (or 'Black') and its "no constitutionally

		significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, 123 S.Ct. 1683 (2003) (or 'Hyatt')-- that "the protection of [constitutionally protected]…speech" in Black and the protection of "constitutionally protected ["speech" and] conduct" in Arnett (416 U.S. 134, 162, 163) has "no constitutionally significant distinction" (Hyatt, 123 S.Ct., at 1690); see App. Q-5. Also see App. Q-1 to Q-11.
08/25/2003	84	Adams Motion or "MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF THIS COURT'S MOST RECENT COLLATERAL STOPPEL, OR ISSUE PRECLUSION, OR RES JUDICATA-CASE LAW IN ADAMS V. THE UNITED STATES, CFC NO. 00-447C (AUGUST 11, 2003)"; see App. R-7 to R-8.Also see App. R-1 to R-8.

AGUSTIN'S CLAIMS 1 TO 8, AND CLAIMS 9 AND 10

CLAIMS 1 TO 8:

NOTE 1: The following is excerpts or quoted from pages 4-5 of Agustin's **08/31/2001 Motion to amend**, based on the IRS' 08/27/2001 denial of Agustin's 1996 and 1997 tax refund claims. This motion was filed on 08/31/2001, Docket Entry No. 27.

QUOTE: AGUSTIN'S CLAIMS AFTER AMENDMENTS

Agustin's amended Complaint should now include all the following money claims:

Claim 1: lost 700.9 sick leave hours pursuant to 65 Statute 681, Section 204 or 5 USC Section 6307; 5 CFR 630.401(a)(1), and/or 5 U.S.C. Section 8118(c); (The "700.9" hours means the 252.9 hours accumulated sick leave he has remaining on 4-21-95 plus the 448 sick leave hours he lost for the period from 2-2-95 to 4-21-95, which should be charged to FECA compensation; 448 + 252.9 = 700.9; 700.9 x $28.47 hourly pay rate on 4-21-95 = **$19954.62**);

Claim 2: additional hours in lost annual leave and sick leave which he would have earned or accrued while on sick leave due to occupational injury, until his sick leave account and annual leave accounts were completely exhausted, pursuant to 5 USC Sections 6303 and 6307; (about 197.63 total accrued hours; 197.63 x $28.47 = **$5626.53**; see Note 2 below);

Claim 3: lost money in taxes which he does not owe (when he included the 448 hours of sick leave he used from 2-2-95

to 4-21-95 in his 1995 tax returns as taxable income) pursuant to the FECA and 26 USC Section 104(a)(1);

Claim 4: lost employment pay and benefits since April 21, 1995, which "has resulted" (5 USC Section 5596(b)(1)) from the violations or deprivations of Agustin's substantive constitutional, statutory, and/or regulatory rights pursuant to our U.S. Constitution, 65 Statute 681, Section 204 or 5 USC Section 6307; 5 CFR 630.401(a)(1), (2); 5 USC Section 6303; and/or 5 U.S.C. Section 8118(c);

Claim 5: tax refund claims for 1996 in the amount of $7100.00, and for 1997 in the amount of $2682.50, (the subject of the instant [08/31/2001] motion); and his inextricably intertwined, constitutional claims:

Claim 6: the unconstitutional taking of his right[s, interests,] or property without just compensation, [which include the amounts in Claims 1 and 2];

Claim 7: the infringement of his substantive constitutional right to medical care or treatment; and

Claim 8: the violation of his constitutional right to equal protection of the laws. The violations of Agustin's statutory, regulatory, and constitutional rights also "has resulted" (5 USC Section 5596(b)(1)) in his irreparable, actual injury in fact--the aggravation of his occupational injuries or conditions and his continuing total disability, (see exhibit 32).

(Note 2: With Agustin's more than 26 years of federal service (see Service Computation Date: 09-13-68, at exhibit 37), he has a statutory right to earn 8 annual leave and 4 sick

leave hours every 80 hour-pay period. 700.9 + 444.8 = 1145.7 hours. 1145.7/80 = 14.32125 pay periods. 14.32125 x 12 = 171.855 accrued hours. 171.855/80 = 2.1481875 pay periods. 2.1481875 x 12 = 25.77825 accrued hours. 171.855 + 25.77825 = 197.63 total accrued hours. 197.63 x $28.47 = **$5626.53**, based on his hourly pay rate on 4-21-95, not on the current pay rate of this position. Agustin's loss of 700.9 total sick leave hours and loss of 197.63 total accrued hours should be computed based on the current, hourly pay rate of his position. See exhibits 38 and 37.) **UNQUOTE.**

QUOTED FROM pages 4-5 of PLAINTIFF'S **08/31/2001 MOTION to amend**, based on the IRS' 08/27/2001 denial of Agustin's 1996 and 1997 tax refund claims. This motion was filed on 08/31/2001, Docket Entry No. 27.

CLAIMS 9 AND 10:

NOTE 2: The following is excerpt or quoted from page 2 of Agustin's **05/06/2003 Motion to Amend** to include CLAIMS 9 and 10, based on our U.S. Supreme Court's quite recent announcement, or reannouncement, or clarification of its constitutionally protected speech-case law in Virginia v. Black, 123 S.Ct. 1536 (2003) (or 'Black') and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, 123 S.Ct. 1683 (2003) (or 'Hyatt'). This motion was filed on 05/06/2003 (Docket Entry No. 66).

QUOTE:

CLAIM 9—the Navy's 4-12-95 violation or infringement of Agustin's fundamental and substantive Due Process right or liberty interest to enjoy or exercise his statutory and

regulatory rights pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995], and

CLAIM 10—the Navy's 4-12-95 violation or infringement of Agustin's fundamental and substantive Due Process right or liberty interest to continuous federal employment without violation of his statutory and regulatory rights. **UNQUOTE.**

QUOTED FROM 05/06/2003 Motion to Amend to include CLAIMS 9 and 10, based on our U.S. Supreme Court's quite recent announcement, or reannouncement, or clarification of its constitutionally protected speech-case law in Virginia v. Black, 123 S.Ct. 1536 (2003) (or 'Black') and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, 123 S.Ct. 1683 (2003) (or 'Hyatt'). This motion was filed on 05/06/2003 (Docket Entry No. 66). See App. Q-1 to 11.

EXCERPTS FROM AGUSTIN'S 07/31/2001 MOTION TO AMEND HIS COMPLAINT TO ADD 448 SICK LEAVE HOURS THAT HE LOST FROM 2-2-95 TO 4-21-95—A CLAIM BASED ON QUITE RECENT DEVELOPMENT—THE GOVERNMENT'S GRANT OF HIS FECA COMPENSATION ON 04/13/2001; (THIS MOTION WAS FILED ON 07/31/2001, DOCKET ENTRY NO. 21):

QUOTE:

[Page 1] **PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT TO INCLUDE: (1) THE [448] SICK LEAVE HOURS THAT HE LOST DURING THE PERIOD FROM FEBRUARY 2, 1995 TO APRIL 21, 1995, AND (2) AFTER INCLUDING THIS [448] HOURS OF SICK LEAVE, THE SICK LEAVE AND ANNUAL LEAVE BENEFITS THAT HE LOST DUE TO THE GOVERNMENT'S UNLAWFUL DEPRIVATION OF HIS SICK LEAVE RIGHTS OR BENEFITS, BASED ON NEW AND RECENT DEVELOPMENT**

On February 10, 1995, plaintiff's FECA benefits were suspended by the U.S. Department of Labor (or "DOL"), with the suspension of his benefits effective on January 23, 1995. From January 23, 1995 to April 21, 1995, plaintiff (or "Agustin") was on approved sick leave for 512 hours due to occupational injury. See exhibit 33. ***On April 13, 2001, DOL granted his FECA benefits retroactive from February 2, 1995 to present.*** See exhibit 34. In a May 7, 2001 letter (exhibits 35-39; also see exhibit 40), plaintiff requested the Navy to exercise his statutory right to receive FECA compensation for the period from February 2, 1995 to April

21, 1995 by exercising his right to buy back the [448] hours of sick leave he used because he could not exercise his statutory right to receive FECA compensation if he was also on pay for leave status at the same time. The Navy received plaintiff's request on 5-10-01, but has not responded to date. See exh. 40.

The key and threshold issue here is: ***based on the DOL's April 13, 2001 decision, whether plaintiff has a statutory right to FECA compensation from 2-2-95 to 4-21-95***?

Based on this new and recent development, plaintiff presents and submits to this honorable Court that he has a constitutionally protected, statutory right to receive FECA compensation from February 2, 1995 to April 21, 1995, instead of being placed on sick leave. During the said period, plaintiff would rather be on FECA compensation status but he was forced to request sick leave for the said period against his will because he had no choice. In order to continue exercising his constitutional right to medical care or treatment due to occupational injury and avoid interruption of his income, he had no choice but to request sick leave at that time. This unjustified or unwarranted personnel action--being on sick leave rather than on FECA compensation also caused plaintiff actual, injury in fact--deprivations of his statutory rights under FECA and under our federal income tax laws. This action adversely affected his right under our tax laws because being on leave status is taxable while being on FECA compensation is not.

Now that an appropriate authority has found that plaintiff has a statutory right to FECA compensation for the said period, he respectfully requests this honorable Court to

allow him to amend his Complaint, and that: (1) all the [448] sick leave hours he used for the period from February 2, 1995 to April 21, 1995 should be charged to FECA compensation, and that [448] hours should be added to the 252.9 hours of sick leave which the government unconstitutionally took away from him without just compensation; and (2) that the amount of money that he lost in sick leave and annual leave benefits based on the new total ([448] plus 252.9 = [700.9] total sick leave, plus [444.8] annual leave), which he would have used had the Navy did not deprived or violated his sick leave rights or benefits, and **which would have earned him additional sick leave and annual leave**, until his sick leave and annual leave accounts were completely exhausted, be added in the instant Complaint. See exhibit 6 of plaintiff's 5-18-00 Complaint, concerning the government's exhaustion of leave procedures involving approved sick leave. All federal employees have the same fair and equal, constitutionally protected, statutory right to earn sick leave and annual leave when on sick or annual leave pay status. The government's unlawful deprivation of plaintiff's constitutional, statutory, and regulatory rights to use sick leave due to occupational injury triggered this honorable Court's jurisdiction pursuant to the Back Pay Act and the Tucker Act. Plaintiff also presents and submits that correction of this unjustified or unwarranted personnel action: to be placed on FECA compensation from February 2, 1995 to April 21, 1995, through an order by this Court to the Navy and to the DOL, is within this Court's jurisdiction under the Back Pay Act, and he requests the Court to issue such an order as part of the relief in this Complaint. All the Navy has to do is verify and inform DOL how much sick leave hours were involved.

(Note 1: On April 21, 1995, the government: (1) unconstitutionally took away his constitutionally protected property--the [448] sick leave hours which were charged to him from 2-2-95 to 4-21-95 plus his 252.9 hours of unused, accumulated sick leave remaining on 4-21-95--without just compensation; (2) unlawfully deprived him of his substantive, constitutionally protected, statutory and regulatory rights or benefits to use sick leave--to use his accumulated sick leave, accumulated annual leave, or both--pursuant to 5 U.S.C. Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR 630.401(a)(1), (2); and in so doing, (3) violated his substantive constitutional right to medical care or treatment due to occupational injury; and (4) violated his constitutional right to equal protection of the laws under the equal protection component of our U.S. Constitution's Fifth Amendment--his equal protection-constitutional right to enjoy or exercise the same fair and equal, statutory and regulatory rights granted to him and to all federal employees by the said statutes and regulations.)

Plaintiff presents and submits that our U.S. Constitution's provisions, which granted individuals substantive constitutional rights to medical care or treatment and to equal protection of the laws, and/or these statutes and regulations, were "applicable law[s]" or "regulation[s]" within the meaning of the Back Pay Act. The unconstitutional taking of his [700.9] hours of sick leave without just compensation and the unlawful deprivation of his statutory and regulatory rights under these statutes and regulations was an "unjustified or unwarranted personnel action" which has resulted in plaintiff's irreparable, actual injury in fact--the aggravation of his occupational injuries or conditions (which had caused him to suffer disabling

consequential injuries: major depression, post traumatic stress disorder, and organic brain syndrome) (see exhibit 32), and which entitled plaintiff to an award of lost wages (more than $10, 0000.00 in lost, [700.9] hours of sick leave, and in lost sick leave and annual leave benefits had the Navy did not deprived his sick leave rights or benefits; and more than $10, 000.00 in back pay in lost employment pay and benefits since April 21, 1995) against the United States. See the regulatory definition of "unjustified or unwarranted personnel action" in 5 CFR Section 550.803.

Our U.S. Constitution is the supreme "law" of the United States. It is now well established that individuals have substantive constitutional rights to medical care or treatment and to equal protection of the law under our U.S. Constitution. The government's unconstitutional taking of plaintiff's [700.9] hours of sick leave without just compensation, and its unlawful deprivation of plaintiff's the same fair and equal, statutory and regulatory rights or benefits to use sick leave due to occupational injury, which were granted to all federal employees by the said statutes and regulations, infringed or violated plaintiff's substantive constitutional right to medical care or treatment and his constitutional right to equal protection of the laws. "It [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests". Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Plaintiff also presents and submits that this honorable Court is an "appropriate authority" under the Back Pay Act to adjudicate the merits of his claims, and that this honorable Court has sole jurisdiction over his money claims pursuant to the Tucker Act. See the Back Pay Act, 5 USC Section 5596; the Tucker Act, 28 USC Section 1491(a)(1); the regulatory

definition of "appropriate authority" in 5 CFR Section 550.803; and footnote 2, at page 5 (exhibit 27), and page 9 (exhibit 31), of the District Court's May 23, 2001 Order, which has established that 28 USC Section 1500 does not apply here.

"There is little doubt that the violation of [5 U.S.C. Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR 630.401(a)(1), (2), and/or the infringements or violations of plaintiff's substantive constitutional rights to medical care or treatment and to equal protection of the laws] alleged by [Agustin] here is exactly the type of 'unwarranted personnel action' addressed by the Back Pay Act." See Hambsch v. U.S., 490 U.S. 1054, 1057 (1989) (Justice O'CONNOR, with whom Justice SCALIA and Justice KENNEDY join, dissenting; also see Justice STEVENS' memorandum respecting the denial of the petition for writ of certiorari, that the Court's order in this case was "not a ruling on the merits of any question presented by the petition." Id., at 1054). The Back Pay Act itself is an "explicit waiver" "of immunity from suit", and it triggers this Court's Tucker Act jurisdiction. Id., at 1057. **UNQUOTE**.

QUOTED FROM pages 1 to 5 of Agustin's **07/31/2001 Motion to Amend** to include the 448 hours of sick leave that he lost from 2-2-95 to 4-21-95, based on the DOL's 4-13-01 grant of Agustin's FECA compensation retroactive to 2-2-95. This motion was filed on 07/31/2001, Docket Entry No. 21.

EXCERPTS FROM AGUSTIN'S 08/31/2001 MOTION TO AMEND HIS COMPLAINT TO INCLUDE HIS 1996 AND 1997 TAX REFUND CLAIMS BASED ON QUITE RECENT DEVELOPMENT—THE IRS' 08/27/2001 DENIAL OF SUCH CLAIMS; (MOTION WHICH WAS FILED ON 08/31/2001, DOCKET ENTRY NO. 27):

QUOTE:

[Page 1] **PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT, A SECOND TIME, TO INCLUDE: HIS TAX REFUND CLAIMS FOR TAX YEARS 1996 AND 1997, BASED ON NEW AND RECENT DEVELOPMENT**

This motion is triggered by new and recent chain of events which has resulted from **the same operative fact**: the U.S. Department of Labor's (or "DOL") April 13, 2001, award of Federal Employees Compensation Act (FECA) compensation benefits to plaintiff (or "Agustin") retroactive from 2-2-95 to present. Agustin's 7-27-01 motion for leave to amend his complaint was based on **the same operative fact**.

In Agustin's 7-27-01 motion for leave to amend his complaint, he requested that the following claims be included in his Complaint: (a) the 448 sick leave hours he lost for the period from 2-2-95 to 4-21-95, which should be charged to FECA compensation, pursuant to 65 Statute 681, Section 204 or 5 USC Section 6307; 5 CFR 630.401(a)(1), (2); and/or the FECA, (see **Claim 1** below); (b) the additional hours in lost annual leave and sick leave which he would have earned or accrued while on sick leave due to occupational injury, until his sick leave account and annual leave accounts were completely exhausted, pursuant to 5

USC Sections 6303 and 6307, (see **Claim 2** below); and (c) lost money in taxes which he does not owe (when he included the 448 hours of sick leave he used from 2-2-95 to 4-21-95 in his 1995 tax returns as taxable income) pursuant to the FECA and 26 USC Section 104(a)(1), (see **Claim 3** below).

Defendant's counsel has informed plaintiff that defendant opposes this motion.

HISTORICAL BACKGROUND AND STATEMENT OF FACTS

See Note 1 below for the historical background and statement of facts of this new and recent development, which necessitated this motion.

(Note 1: Excerpts from Agustin's August 8, 2001 appeal/letter to the IRS (exhibits 52-53): On December 14, 1993, Mr. Agustin, a Navy civilian federal employee, sustained an on the job injury. He timely filed a Federal Employees Compensation Act (FECA) claim based on his 12-14-93 work injury to the U.S. Department of Labor (DOL). In April 1995, Agustin was separated from his Navy civilian federal employment, (see exhibit 37). In February 1996, Agustin's disability retirement application was granted by the Office of Personnel Management (OPM), with his disability retirement annuity retroactive from April 1995. (Agustin received disability retirement annuity from April 1995 until April 2001.) For the years 1996 to 2000, he received the following OPM disability retirement annuity:

1996	$41,697.57 (includes annuity from April 1995)
1997	$26,724.00

1998 $27,276.00
1999 $27,624.00
2000 $28,284.00

In April 1997, Mr. and Mrs. Agustin timely filed their 1996 joint, federal income tax return. Similarly, in April 1998, they timely filed their 1997 joint, federal income tax return. Mr. Agustin included the OPM disability retirement annuities he received for 1996 and 1997 as taxable income in their 1996 and 1997 tax returns. On April 13, 2001, the U.S. Department of Labor (DOL) granted his FECA compensation benefits, with his FECA compensation retroactive from February 1995 to present, (see exhibits 34 and 32). Based on the DOL's FECA compensation award, he elected to receive FECA compensation, and DOL paid in full the total disability retirement annuity he received from OPM from April 1995 through April 2001. In a May 30, 2001 letter (exhibit 47), OPM informed DOL, with a copy to Mr. Agustin, that his overpayment or the total amount of disability retirement annuity he received from April 1995 to April 2001, in the amount of $163, 800.57, has been paid in full. His election of FECA compensation for the said period created an overpayment because of dual coverage of OPM's Disability Retirement and FECA compensation, and DOL paid in full the total amount of OPM disability retirement annuity Mr. Agustin has received from April 1995 to April 2001 from Mr. Agustin's FECA compensation award. See exhibits 47-48. In a July 3, 2001 letter (exhibits 45-46), based on DOL's April 13, 2001 decision and the total payment in full of his OPM disability retirement annuities which he received for the years 1996 through 2000, Mr. and Mrs. Agustin filed amended tax returns (Form 1040X) for Tax Years 1996 (exhibits 41-42), 1997 (exhibits 43-44), 1998, 1999, and 2000 with the Internal Revenue Service (IRS), to claim refunds of their overpaid taxes for the said

years because his FECA compensation are not taxable. The IRS received these amended tax returns, by registered mail with return receipt requested, on July 10, 2001. In a August 3, 2001 notice (exhibits 49-51), the IRS informed them that their **tax refund claims for Tax Years 1996 (for $7100.00) and 1997 (for $2682.50)** have been disallowed because such claims were "filed late" (exhibit 49). In an August 8, 2001 letter to the IRS (exhibits 52-57), Mr. and Mrs. Agustin filed an appeal concerning the 8-3-01 disallowance notice of their tax refund claims for 1996 and 1997. In an August 27, 2001 letter (exhibits 58-59), the IRS denied Agustin's 8-8-01 appeal. And hence, this motion follows.)

Without allowing Agustin to amend the instant complaint to include his tax refund claims for tax years 1996 and 1997, he has no other choice except to file another Complaint in this Court or the appropriate U.S. District Court. Such Complaint would be a related case with the instant Complaint, would involve the same operative facts, the same issues, and the same controlling authorities, and would be piece meal judicial adjudication of his claims. With all due and utmost respect to this honorable Court, such related Complaint, which could be, and should be, consolidated and adjudicated with the instant Complaint, would be a waste of our federal court's judicial time, energy, and resources. A court may consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation. See Chitimacha Tribe of Louisiana v. Harry L. Laws Company, 690 F. 2d 1157, 1163 (5th Cir. 1982), which is a controlling authority compelling the granting of this motion. Forman v. Davis, 371 U.S. 178, 182 (1962) is another controlling authority which compels and requires granting the instant motion. Here, based on Forman v. Davis, there is no reason why this Court should deny this motion. Most importantly, another

reason why this motion should be granted is because the information necessary for such an amendment--the U.S. Department of Labor's (DOL) April 13, 2001 decision (exhibit 34), which granted Agustin a statutory right to the payment of tax-free FECA compensation from February 2, 1995 to present, and the IRS' 8-27-01 denial of his 1996 and 1997 tax refund claims--**were not available** to Agustin when he filed his original Complaint.

AGUSTIN'S CLAIMS AFTER AMENDMENTS

Agustin's amended Complaint should now include all the following money claims:

Claim 1: lost 700.9 sick leave hours pursuant to 65 Statute 681, Section 204 or 5 USC Section 6307; 5 CFR 630.401(a)(1), and/or 5 U.S.C. Section 8118(c); (The "700.9" hours means the 252.9 hours accumulated sick leave he has remaining on 4-21-95 plus the 448 sick leave hours he lost for the period from 2-2-95 to 4-21-95, which should be charged to FECA compensation; 448 + 252.9 = 700.9; 700.9 x $28.47 hourly pay rate on 4-21-95 = **$19954.62**); **Claim 2**: additional hours in lost annual leave and sick leave which he would have earned or accrued while on sick leave due to occupational injury, until his sick leave account and annual leave accounts were completely exhausted, pursuant to 5 USC Sections 6303 and 6307; (about 197.63 total accrued hours; 197.63 x $28.47 = **$5626.53**; see Note 2 below); **Claim 3**: lost money in taxes which he does not owe (when he included the 448 hours of sick leave he used from 2-2-95 to 4-21-95 in his 1995 tax returns as taxable income) pursuant to the FECA and 26 USC Section 104(a)(1); **Claim 4**: lost employment pay and benefits since April 21, 1995, which "has resulted" (5 USC Section 5596(b)(1)) from the violations or deprivations of Agustin's substantive

constitutional, statutory, and/or regulatory rights pursuant to our U.S. Constitution, 65 Statute 681, Section 204 or 5 USC Section 6307; 5 CFR 630.401(a)(1), (2); 5 USC Section 6303; and/or 5 U.S.C. Section 8118(c); **Claim 5**: tax refund claims for 1996 in the amount of $7100.00, and for 1997 in the amount of $2682.50, (the subject of the instant motion); and his inextricably intertwined, constitutional claims: **Claim 6**: the unconstitutional taking of his right or property without just compensation; **Claim 7**: the infringement of his substantive constitutional right to medical care or treatment; and **Claim 8**: the violation of his constitutional right to equal protection of the laws. The violations of Agustin's statutory, regulatory, and constitutional rights also "has resulted" (5 USC Section 5596(b)(1)) in his irreparable, actual injury in fact--the aggravation of his occupational injuries or conditions and his continuing total disability, (see exhibit 32).

(Note 2: With Agustin's more than 26 years of federal service (see Service Computation Date: 09-13-68, at exhibit 37), he has a statutory right to earn 8 annual leave and 4 sick leave hours every 80 hour-pay period. 700.9 + 444.8 = 1145.7 hours. 1145.7/80 = 14.32125 pay periods. 14.32125 x 12 = 171.855 accrued hours. 171.855/80 = 2.1481875 pay periods. 2.1481875 x 12 = 25.77825 accrued hours. 171.855 + 25.77825 = 197.63 total accrued hours. 197.63 x $28.47 = **$5626.53**, based on his hourly pay rate on 4-21-95, not on the current pay rate of this position. Agustin's loss of 700.9 total sick leave hours and loss of 197.63 total accrued hours should be computed based on the current, hourly pay rate of his position. See exhibits 38 and 37.)

ARGUMENTS IN SUPPORT OF THIS MOTION AND THIS ADDED CLAIM

In support of his tax refund claims for 1996 and 1997 (**Claim 5** above), Agustin presents and submits to this honorable Court the same reasons or arguments which he submitted to the IRS in his 8-8-01 appeal (exhibits 54-57), and which are quoted in Note 3 below.

(Note 3: QUOTE: First, the U.S. Court of Appeals for the Federal Circuit instructs that "a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action", see Hopland Band of Pomo Indians v. United States, 855 F. 2d 1573, 1577 (Fed. Cir. 1988), at which time "'the plaintiff has a legal right to maintain his or her action.'" Catawba Indian Tribe of S. C. v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (quotation omitted). The "proper focus for statute of limitations purposes, 'is upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts became most painful.'" Fallini v. United States, 56 F. 3d 1378, 1383 (Fed. Cir. 1995) (quoting Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). However, "'a claim does not accrue unless the claimant knew or should have known that the claim existed.'" Hopland Band, 855 F. 2d at 1577 (quoting Kinsey v. United States, 852 F. 2d 556, 557 n. * (Fed. Cir. 1988)).

Here, the taxpayers' claims first accrue, on April 13, 2001, when DOL granted his statutory right to the payment of money under the FECA. Prior to April 13, 2001, they did not know, and they could not have known that they have such claims. Or in the alternative, their claims first accrue on May 30, 2001, when OPM informed Mr. Agustin that his OPM disability retirement annuities, which he had received for the period from April 1995 to April 2001 has been paid in full by DOL from his FECA compensation award. They do not have a legal right and were not entitled to institute an

action to file refund claims for 1996 and 1997 until after DOL paid in full Mr. Agustin's 1996 and 1997 disability retirement annuities from Mr. Agustin's FECA compensation award. Based on these facts and the above controlling authorities, their claims should be granted.

Second, even assuming arguendo, just for the sake of argument, that the taxpayers' claims were filed late, the doctrine of equitable tolling excuses the taxpayers' failure to comply with the statute of limitations. As a prerequisite to obtaining such relief, "plaintiff must show either that defendant has concealed its act with the results that plaintiff was unaware of the existence of a cause of action or **that the nature of plaintiff's injury was such that it was inherently unknowable at the time the cause of action accrued.**" Wilcox v. United States, 3 Cl. Ct. 83, 85 (1983) (bold and underline added). Also see Japanese War Notes Claimants Ass'n. v. United States, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967).

Here, there is no question at all that the taxpayers' injury was inherently unknowable. The taxpayers, Mr. and Mrs. Agustin, were not aware of a possible claim and cause of action until after April 13, 2001, when the DOL granted Mr. Agustin's FECA compensation retroactive from February 1995 to present. And even with the DOL's April 13, 2001 grant of Mr. Agustin's FECA compensation, they did not have a legal right to maintain a cause of action until after the DOL paid in full, Mr. Agustin's OPM disability retirement annuity payments for 1996 and 1997. They could not file a legally valid claim with the IRS until after DOL has paid in full Mr. Agustin's 1996 and 1997 disability retirement annuities. Based on OPM's May 30, 2001 letter, which has established that Mr. Agustin was on FECA compensation for tax years 1996 and 1997, they became

aware that Mr. Agustin has a statutory right to non-taxable FECA compensation for the years 1996 and 1997, that they have a legally valid cause of action, and they filed their claims. Based on all the foregoing, the doctrine of equitable tolling applies in this case, and their claims should be granted.

Third, another reason why their refund claims for 1996 and 1997 should be granted is because 26 USC Section 6511 is unconstitutional because it applies unfairly to FECA compensation recipients. Or in the alternative, as applied to the facts in the instant case, the application of 26 USC 6511 against Mr. Agustin, violated his constitutional right to equal protection of the laws under the equal protection component of our U.S. Constitution's Fifth Amendment, and their 1996 and 1997 refund claims should be granted.

All FECA compensation recipients are similarly situated, disabled persons, and they all have the same fair and equal, statutory rights to a no "fault" benefits under FECA (see Weyerhauser, 372 U.S., at 601) and to a non-taxable FECA compensation under 26 USC Section 104(a)(1). However, 26 USC Section 6511 applies unfairly to them because, for reasons beyond their fault or control, some recipients could enjoy and exercise such statutory rights and some could not.

"The Act [FECA]...is essentially an act of justice...designed to compensate, promptly, without litigation or expense, all employees injured while in discharge of duty". Dahn v. Davis, 258 U.S. 421, 431 (1922), (bold and underline added). "The legislative history of the Federal Employees' Compensation Act...shows that the concern of Congress is to provide federal employees a swift, economical, and assured right of compensation for injuries

arising out of the employment relationship regardless of the negligence of the employee or his fellow servants, or the lack of fault on the part of the United States." Weyerhaeuser S. S. Co. v. U.S., 372 U.S. 597, 601 (1963), (bold and underline added). Under FECA, "employees are guaranteed the right to receive immediate, fixed benefits". Lockheed Aircraft Corp. v. U.S., 460 U.S. 190, 194 (1983), (bold and underline added). Part of that constitutionally protected benefits are statutory rights to a no "fault" FECA statutory scheme, to a tax-free, FECA compensation, and to a prompt, swift, or immediate FECA benefits.

Although 26 USC Section 6511 "establishes no explicit classification and does not expressly distinguish between claimants [or FECA compensation recipients]" (Logan, at 1159), our federal government's interpretation and/or application of this statute through its "established [federal] procedures" (Logan, at 1158), as what had happened to the taxpayers in the instant case, "unambiguously divides...claimants [or FECA compensation recipients]...into two discrete groups that are accorded radically disparate treatment" (Logan, at 1159)--those FECA compensation recipients who **could** enjoy and exercise their statutory right to non-taxable FECA compensation, and those who **could not** exercise such right. See Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1158, 1159 (1982) (Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR join). " The government's application of 26 USC Section 6511 against Mr. Agustin had very clearly violated our U.S. Constitution's Equal Protection requirement that "all persons similarly situated...be treated alike". Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

Here, the government could never use a "rational basis" defense for violating FECA compensation recipients' statutory rights and their equal protection-constitutional right. Here, the government could never successfully argue that the government's obliteration of FECA compensation recipients' statutory and constitutional rights "classify the persons it affects in a manner rationally related to legitimate government objectives". Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

As applied to the facts in the instant case, the application of 26 USC 6511 against the taxpayers, Mr. and Mrs. Agustin, violated Mr. Agustin's constitutional right to equal protection of the laws under the Equal Protection component of our U.S. Constitution's Fifth Amendment, and the disallowance of their 1996 and 1997 refund claims was void ab initio and/or unconstitutional.

Fourth, the IRS' August 3, 2001 disallowance of the taxpayers' claims was void ab initio and/or unconstitutional because it violated our U.S. Constitution's protections from deprivation of property without due process and from unconstitutional taking of property without just compensation.

Here, there is no question that based on DOL's April 13, 2001 award of FECA compensation and DOL's payment in full of all of Mr. Agustin's disability retirement annuities, he has a constitutionally protected, property interest to a federal tax free-FECA compensation from February 1995 to the present. Here, "it is the [federal] system itself that destroys a complainant's property interest, by operation of law, whenever the [federal government] fails" to grant such complainant's FECA compensation award in a timely manner within 26 USC Section 6511's statute of limitations. See

Logan, id., at 1158. Such a system unconstitutionally deprived Mr. Agustin of his property interest.

Furthermore, Mr. and Mrs. Agustin, present and submit that the IRS' disallowance of their refund claims for 1996 and 1997 was an unconstitutional taking of their property--Mr. Agustin's right or interest to a tax-free FECA compensation pursuant to 26 USC Section 104(a)(1)--without just compensation. After DOL's full payment of all of Mr. Agustin's OPM disability retirement annuities from his FECA compensation award sometime on or before May 30, 2001, Mr. Agustin's statutory right and property interest to a tax-free FECA compensation has been established. Our U.S. Constitution is the supreme law of the land, and when a federal statute's (26 USC Section 6511's) disallowance notice unconstitutionally took away his property interest in violation of our U.S. Constitution's application is inconsistent with our U.S. Constitution's provisions, our Constitution must, and always, prevails. Therefore, the IRS' August 3, 2001 Taking Clause provision.

Because of the unconstitutional deprivation of Mr. Agustin's property interest and/or its unconstitutional taking by the government without just compensation, the IRS' 8-3-01 disallowance notice was void ab initio and/or unconstitutional.

Based on any one or all of the above reasons, Mr. and Mrs. Agustin's refund claims for 1996 and 1997 should be granted. UNQUOTE. Agustin's 8-8-01 appeal/letter to the IRS, at pages 3-6, (exhibits 54-57).

In summary, as Agustin has raised and presented in Note 2 above, his 1996 and 1997 tax refund claims should be granted based on the following reasons:

First, his 1996 and 1997 tax refund claims first accrued on April 13, 2001 or on May 30, 2001. Based on the DOL's April 13, 2001 FECA compensation award decision/letter (exhibit 34), it has been established that Agustin is entitled, and that he has statutory right to tax-free FECA compensation from February 2, 1995 to present. "As the Supreme Court noted, when there is a legal right without a legal remedy, the right has little meaning." N.A.A.C.P. v. Medical Ctr. Inc., 599 F.2d 1247, 1254-5 (3rd Cir.1979).

Second, even assuming arguendo, just for the sake of argument, that Agustin's tax refund claims were filed late, the doctrine of equitable tolling excuses Agustin's failure to comply with the statute of limitations.

Third, another reason why Agustin's refund claims for 1996 and 1997 should be granted is because 26 USC Section 6511 is unconstitutional because it applies unfairly to FECA compensation recipients. Or in the alternative, as applied to the facts in the instant case, the application of 26 USC Section 6511 against Agustin, violated his constitutional right to equal protection of the laws under the equal protection component of our U.S. Constitution's Fifth Amendment. As noted above, here, "it is the [federal] system itself that destroys a complainant's property interest, by operation of law, whenever the [federal government] fails" to grant such complainant's FECA compensation award in a timely manner within 26 USC Section 6511's statute of limitations. See Logan v. Zimmerman Brush Co., 102 S.Ct. 1148, 1158 (1982).

Fourth, the IRS' August 3, 2001 disallowance of Agustin claims was void ab initio and/or unconstitutional because it violated our U.S. Constitution's protections from deprivation of property without due process and from

unconstitutional taking of property without just compensation.

SUBJECT MATTER JURISDICTION

This Court has subject matter jurisdiction over Agustin's 1996 and 1997 tax refund claims pursuant to 28 USC Section 1346(a)(1); 28 USC Section 1491(a), the Federal Employees Compensation Act (FECA), and/or 26 USC Section 104(a)(1).

The Federal Employees Compensation Act (FECA) is a money-mandating statute which mandate the payment of money, and which granted federal employees statutory right to compensation, or to use sick leave, annual leave, or both, due to accepted, occupational total disability. See 5 U.S.C. Section 8118(c) and 20 CFR Section 10.401.

26 USC Section 104(a)(1) is money-mandating in nature, because it granted federal employees a statutory right to the payment of *tax-free* money in the form of *tax-free*, federal FECA compensation payments. Based on the DOL's April 13, 2001 decision (exhibit 34), which granted Agustin a statutory right to FECA compensation from 2-2-95 to the present, Agustin has statutory right to *tax-free* FECA compensation for the said period, including for the tax years 1996 and 1997. **UNQUOTE**.

QUOTED FROM Agustin's **08/31/2001 Motion to amend**, based on the IRS' 08/27/2001 denial of Agustin's 1996 and 1997 tax refund claims. This motion was filed on 08/31/2001, Docket Entry No. 27.

THE CLAIMS COURT'S DEPRIVATION OR VIOLATION OF AGUSTIN'S FIRST AMENDMENT CONSTITUTIONAL RIGHT "TO PETITION" THAT COURT FOR THE INTERPRETATION, RELEVANCE, AND APPLICABILITY OF THE TUCKER ACT AND THE BACK PAY ACT IN THE INSTANT CASE

QUOTE:

Pursuant to our U.S. Supreme Court's new and recent interpretation of its constitutional right "to petition" case law in BE & K Construction Co. v. NLRB, [122 S.Ct. 2390, 2396 (2002)] (see Note 2 below), Agustin respectfully requests this Court to enjoy or exercise such right, and he hereby petitions this Court for the interpretation of 5 USC Sections 6307, 6303, and 8118(c), the Back Pay Act, and the Tucker Act and for the interpretation and applicability of our U.S. Constitution's Equal Protection guarantee in the instant case.

(Note 2: "We have also considered the right to petition when interpreting federal law...We thus made explicit that 'the right to petition extends to all departments of the Government,' and that '[t]he right of access to the courts is...but one aspect of the right to petition.' [404 U.S.] at 510." BE & K Construction Co. v. NLRB, [122 S.Ct. 2390, 2396 (2002)], U.S. Supreme Court No. 01-518 (June 24, 2002), pages 10-11 of 31 pages, at internet web site: www.supremecourtus.gov/opinions/01slipopinion.html). **UNQUOTE**.

QUOTED FROM page 9 of Agustin's "7/11/02 Reply" or "REPLY TO: 'DEFENDANT'S RESPONSE TO NEW AUTHORITY PRESENTED BY PLAINTIFF IN SUPPORT

OF HIS SICK LEAVE RIGHTS VIOLATION CLAIM",
which was **filed by leave of the Judge** on 06/17/2003,
Docket Entry No. 73.

EXCERPTS FROM AGUSTIN'S 02/27/2003 MOTION TO SUPPLEMENT THE RECORD BASED ON QUITE RECENT DEVELOPMENT; (MOTION WHICH WAS FILED ON 02/27/2003, DOCKET ENTRY NO. 46)

QUOTE:

[Page 1] PLAINTIFF'S EX PARTE MOTION TO SUPPLEMENT THE RECORD IN THE INSTANT CASE BASED ON OUR U.S. SUPREME COURT'S RECENT REANNOUNCEMENT OF: (1) ITS "CLEARLY ESTABLISHED PRECEDENTS"-CASE LAW IN EARLY V. PACKER, [123 S.CT. 362, 365 (2002)], AND (2) ITS FEDERAL AGENCY ACTION IN VIOLATION OF "ANY LAW"--SUCH ACTION MUST BE SET ASIDE-CASE LAW IN FCC V. NEXT WAVE PERSONAL COMMUNICATIONS, INC., [123 S.CT. 832, 838 (2003)]

Pursuant to Rule 7(b)(1), Plaintiff (or "Agustin") respectfully requests this honorable Court to supplement the record and to include the instant document as part of the records in the instant case based on our U.S. Supreme Court's recent reannouncement of: (1) its "clearly established precedents"-case law in Early v. Packer, U.S. No. 01-1765 (11-4-02), (or "Packer"), (page 5 of slip opinion, under "Latest Slip Opinions", at U.S. Supreme Court's internet web site (or at "www.supremecourtus.gov/opinions/02slipopinion.html", under "Latest Slip Opinions")), and (2) its federal agency action in violation of "any law"—such action must be set aside-case law in FCC v. Next Wave Personal Communications Inc., U.S. No. 01-653 (1-27-03), (or "Next Wave"), (page 6 of slip opinion, under "Latest Slip Opinions", at U.S. Supreme Court's internet web site),

which are relevant and controlling authorities to the outcome of this case.

With respect to federal and postal employers' violations of our money-mandating statutes, or "wrongful" or "' other unwarranted or unjustified personnel actions affecting pay or allowances'" (United States v. Testan, 424 U.S. 392, 405 (1976)), such as the Navy's quite clear violations of Agustin's statutory and regulatory rights under 5 USC Sections 6307, 6303, and 8118(c) and 5 CFR Section 630.401(a)(1), (2), which are applicable laws or regulations under the Back Pay Act, the governing law and our U.S. Supreme Court's "clearly established precedents" (Packer, id)[1] are that such actions are judicially cognizable, that "[t]he statute's [Back Pay Act's] language was intended to provide a monetary remedy for [such] wrongful...personnel actions" (Testan, id., at 405), and that "[t]he Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States" (United States v. Hopkins, 427 U.S. 123, 128 (1976).

Under Webster's New Universal Unabridged Dictionary, Deluxe Second Edition, © 1983, "wrongful" means "unlawful", and "unlawful" means "against the law". Therefore, "wrongful...personnel actions" are such personnel actions which are "against the law" or not in

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[1] "A [federal court's] decision is 'contrary to' our clearly established precedents if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent'. Williams v. Taylor, 529 U.S. 362, 405-406 (2000)." Early v. Packer, U.S. No. 01-1765 (11-4-02), (page 5 of slip opinion, under "Latest Slip Opinions", at U.S. Supreme Court's internet web site).

accordance with "any law" or any provisions of our U.S. Constitution—the supreme law of the land. See our U.S. Supreme Court's recent reannouncement of its governing, federal agency action in violation of "any law"-such action must be set aside-case law in Next Wave[2].

In the instant case, the Navy's 4-12-95 personnel action[3] was "wrongful" within the meaning of Testan and

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[2] "In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 413-414 (1971), (underline added), which was quoted at Next Wave, at pg. 6 of slip opinion. "'[F]ederal agencies must obey all federal laws, not just those they administer'... 254 F. 3d 130, 133 (2001)." Next Wave, at pg. 5-6 of slip opinion, (underline added).

[3] In Agustin's case, at the time of the relevant 4-12-95 disciplinary removal action, the Navy was fully aware of and has total and complete knowledge that he was receiving and was in great need of continuous medical care or treatment due to his occupational injuries. On 2-16-95, Agustin submitted to the Navy his Application for Sick Leave--to use "sick leave due to occupational injury" (exhibit 62), and he had triggered the Navy's 5 USC Sections 6307, 6303, and 8118(c) and 5 CFR Section 630.401(a)(1), (2) legal duties and obligations, as well as its constitutional duties and obligations. On 2-28-95, the Navy "approved" his request until his sick leave and annual leave accounts "become[] exhausted" (exhibit 6). Exhibits 62 and 6 are clear and convincing evidence or records that the Navy's statutory and regulatory duties and obligations under 5 USC Sections 6307, 6303, and 8118(c) and 5 CFR Section 630.401(a)(1), (2) had been triggered, and that the Navy refused or failed to obey our laws and to fulfill its statutory and regulatory duties and obligations. These exhibits (exhibits 62 and 6) were before the attention of the Navy prior to Agustin's separation from employment, and are now before this Court. (Exhibits 6 and 13 were attached to Agustin's "COMPLAINTS OR CLAIMS...", which he had mailed to this Court on 5-18-00; and exhibit 62 was attached to "PLAINTIFF'S REPLY...", which was filed on 9-6-01). On 4-21-95, the effective date of his disciplinary removal, he has unused and remaining 252.9 hours of accumulated sick leave and 444.8 hours of accumulated annual leave (see exhibit 13), which he has statutory, regulatory, and

must be set aside because it has quite clearly violated: (1) 5 USC Sections 6307, 6303, and 8118(c) and 5 CFR Section 630.401(a)(1), (2); and Agustin's Due Process-protected liberty interests (3) to substantive constitutional right to medical care or treatment, (4) to equal protection of the laws, (5) to protection from the unconstitutional taking of his constitutionally-protected property, rights, or interests (his 252.9 hours of unused and remaining, accumulated sick leave and his leave accrual rights or benefits pursuant to the sick leave and annual leave accrual provisions of 5 USC Sections 6307 and 6303) without just compensation, and (6) to continuous federal employment without violation of an employee's statutory and regulatory rights.

Like the claimant/s in Goldberg v. Kelly, 397 U.S. 254 (1970) and in Mathews v. Eldridge, 397 U.S. 319 (1976), in the instant case, Agustin's "entitlement to [sick leave] benefits had been established" (American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 990 (1999)); his sick leave application has been "approved" (exhibit 6); he was receiving sick leave benefits from 1-23-95 to 4-21-95 (see exhibit 13); and he has unused and remaining 252.9 hours of accumulated sick leave and 444.8 hours of accumulated annual leave, which he has entitlement to use as sick leave benefits. "[T]he interest of [Agustin] in continued receipt of these [sick leave] benefits is a statutorily created 'property' protected by the Fifth Amendment." Mathews, id., at 332.

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constitutional rights to use due to occupational injury under 5 USC Sections 6307 and 8118(c) and 5 CFR Section 630.401(a)(1), (2) and under his substantive, constitutional rights to medical care or treatment, to equal protection of the laws, and to protection from the unconstitutional taking of his property, rights, or interests without just compensation—his constitutionally-protected rights or benefits which the Navy had quite clearly violated through its 4-12-95 "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)).

With respect to the Navy's violations of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR Section 630.401(a)(1), (2), and Agustin's rights pursuant to these authorities, the Back Pay Act is "a waiver of sovereign immunity" and the Back Pay Act "provides an avenue for relief". FDIC v. Meyer, 510 U.S. 471, 484 (1994). Like under the Family and Medical Leave Act (FMLA), under the Sick Leave Act, "[t]o trigger employer's [Sick Leave Act duties and] obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave". See Ragsdale v. Wolverine, 122 S.Ct. 1155, 1166 (2002) (Justice O'Connor, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting), and see, accord, 5 CFR Sections 630.401, 402, and 403. Here, on 2-16-95, Agustin has informed the Navy of his reason for seeking sick leave, and he has provided administratively acceptable evidence; on 2-28-95, his application for sick leave has been "approved" until his sick leave and annual leave accounts "become[] exhausted" (exhibit 6); it is clear and unquestionable that the Navy's Sick Leave Act duties and obligations had been triggered; he was receiving sick leave benefits until 4-21-95, and on 4-21-95 (the effective date of the Navy's 4-12-95 "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)), he has unused and remaining 252.9 hours of accumulated sick leave and 444.8 hours of accumulated annual leave, which he has statutory and regulatory rights to use; that Act's implementing regulations with its clear and unambiguous mandatory language, required that the Navy "**must grant sick leave**" (5 CFR Section 630.401(a), (bold and underline added); but the Navy very clearly violated 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2), and Agustin's rights pursuant to these authorities through its 4-12-95 "unjustified or unwarranted personnel action" (5 USC Section

5596(b)(1)).

The Navy's April 12, 1995 violation of 5 USC Sections 6307, 6303, 8118(c), and 5 CFR 630.401(a)(1), (2) and of Agustin's rights pursuant to these money-mandating authorities affecting federal employees' pay and allowances, was an action which is not "appealable to the Board [or Merit Systems Protection Board] under any law, rule, or regulation". 5 USC Section 7701(a). *Expressio unius est exclusio alterius*. The Civil Service Reform Act's explicit mention of "any action which is appealable to the Board under any law, rule, or regulation" excludes any action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (underline added). Concerning our U.S. Supreme Court's recent interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992 (2002) which is quite relevant and controlling with respect to the key and threshold issue of the Board's lack of jurisdiction in the instant case, 5 USC Sections 7701, 7511, 7512, and 7513 "do address" the very limited, enumerated actions which are appealable to the Board, "'but do not include among the enumerated actions any reference to complaints alleging'" violations of a money-mandating statute or regulation such as 5 USC Section 6307, 6303, or 8118(c), or 5 CFR 630.401(a)(1), (2). See Swierkiewicz, at 998, (quotation omitted).

Some of our federal courts' continuous and continuing injustice against our poor federal and postal employees--their blind search for waiver/s of sovereign immunity when federal or postal employers violate our money-mandating statutes affecting federal or postal employees' pay and allowances—is quite "'contrary to'" our U.S. Supreme Court's "clearly established precedents"

(Packer, id.) in Testan and Hopkins. Such continuous and continuing injustice against our poor federal and postal employees: (a) have turned such poor federal and postal employees into lower class citizens (in comparison with our private sector employees); (b) have turned their statutory rights under our money-mandating statutes such as the Sick Leave Act and the Family and Medical Leave Act (FMLA) and their statutory right to a private cause of action under the Back Pay Act, into a nullity; and (c) have turned our U.S. Supreme Court's Back Pay Act-case law in Testan and in Hopkins useless and meaningless.[4] **UNQUOTE**.

QUOTE FROM pages 1 to 6 of Agustin's 02/27/2003 Motion to supplement the record, which was filed on 02/27/2003, Docket Entry No. 46.

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[4] See some of our federal court's blind search for waiver/s of sovereign immunity in Hambsch (857 F.2d 763), Mann (120 F.3d 34 (1997)), and Russell (191 F.3d 1016 (9th Cir. 1999)), which are in conflict with, in violation of, or "contrary to" (Packer, id.) our U.S. Supreme Court's Back Pay Act-case law in Testan, 424 U.S., at 405 and in Hopkins, 427 U.S., at 128. Compare Worthington v. U.S., 168 F.3d 24 (Fed. Cir. 1999), which was a correct interpretation of the Back Pay Act.

OUR U.S. SUPREME COURT'S QUITE RECENT AND QUITE CONTROLLING *"EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS"*-CASE LAW IN SWIERKIEWICZ V. SOREMA N. A., 122 S.CT. 992 (2002), WITH RESPECT TO THE MSPB'S LACK OF JURISDICTION OVER AGUSTIN'S TAKINGS CLAIM AND BACK PAY CLAIM

QUOTE:

[Page 4] With respect to the Navy's violations of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR Section 630.401(a)(1), (2), and Agustin's rights pursuant to these authorities, the Back Pay Act is "a waiver of sovereign immunity" and the Back Pay Act "provides an avenue for relief". FDIC v. Meyer, 510 U.S. 471, 484 (1994)...

[Page 5] The Navy's April 12, 1995 violation of 5 USC Sections 6307, 6303, 8118(c), and 5 CFR 630.401(a)(1), (2) and of Agustin's rights pursuant to these money-mandating authorities affecting federal employees' pay and allowances, was an action which is not "appealable to the Board [or Merit Systems Protection Board] under any law, rule, or regulation". 5 USC Section 7701(a). *Expressio unius est exclusio alterius*. The Civil Service Reform Act's explicit mention of "any action which is appealable to the Board under any law, rule, or regulation" excludes any action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (underline added). Concerning our U.S. Supreme Court's recent interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992 (2002) which is quite relevant and controlling with respect to the key and threshold issue of the Board's lack of jurisdiction in the instant case, 5 USC Sections 7701, 7511, 7512, and 7513

"do address" the very limited, enumerated actions which are appealable to the Board, "'but do not include among the enumerated actions any reference to complaints alleging'" violations of a money-mandating statute or regulation such as 5 USC Section 6307, 6303, or 8118(c), or 5 CFR 630.401(a)(1), (2). See Swierkiewicz, at 998, (quotation omitted). **UNQUOTE**.

QUOTED FROM page 5 of Agustin's 02/27/2003 "Next Wave Motion" or "MOTION TO SUPPLEMENT THE RECORD IN THE INSTANT CASE BASED ON OUR U.S. SUPREME COURT'S RECENT REANNOUNCEMENT OF: (1) ITS "CLEARLY ESTABLISHED PRECEDENTS"-CASE LAW IN EARLY V. PACKER, U.S. NO. 01-1765 (11-4-02), AND (2) ITS FEDERAL AGENCY ACTION IN VIOLATION OF "ANY LAW"--SUCH ACTION MUST BE SET ASIDE-CASE LAW IN FCC V. NEXT WAVE PERSONAL COMMUNICATIONS, INC., [122 S.Ct. 832 (2003))", which was filed on 02/27/2003, Docket Entry No. 46.

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QUOTE:

Our U.S. Supreme Court's new and recent interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002) and in TRW v. Andrews, 122 S.Ct. 441, 447 (2001) very clearly support Agustin's claim that the Board lacks jurisdiction over the Navy's 4/12/95 action which violated 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2). This judicial cannon or doctrine case law--*expressio unius est exclusio alterius*—applies, and is very quite relevant, in the instant case.

Defendant's brave, but bare and bald, assertion that our U.S. Supreme Court's new and recent interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002) and in TRW v. Andrews, 122 S.Ct. 441, 447 (2001) does not make any difference to the outcome of this case is mystifying, dead wrong, futile, and meritless. Our U.S. Supreme Court's new and recent interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002) and in TRW v. Andrews, 122 S.Ct. 441, 447 (2001) does make the absolute and decisive difference with respect to the Board's lack of jurisdiction over Agustin's claims for violations of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2), and to the outcome of this case.

The Navy's April 12, 1995 action, which violated 5 USC Sections 6307, 6303, 8118(c), and 5 CFR 630.401(a)(1), (2), is an action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (bold added). *Expressio unius est exclusio alterius*. The explicit mention of "any action which is appealable to the Board under any law, rule, or regulation" excludes any action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (underline added). Concerning the issue of the Board's very limited jurisdiction and our U.S. Supreme Court's *expressio unius est exclusio alterius* case law, 5 USC Sections 7701, 7511, 7512, and 7513 "do address" the very limited, enumerated actions which are appealable to the Board, "'but do not include among the enumerated actions any reference to complaints alleging'" violations of a money-mandating statute or regulation such as 5 USC Section 6307, 6303, or 8118(c), or 5 CFR 630.401(a)(1), (2). See Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002), (quotation

omitted). Also see our U.S. Supreme Court's continuous and continuing application of its *expressio unius est exclusio alterius* case law in TRW v. Andrews, 122 S.Ct. 441, 447 (2001). There is "no law, rule, or regulation that gives the Board jurisdiction over [Agustin's] claim[s] for violation[s] of [5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2)]". See Worthington v. U.S., 168 F3d 24, 27 (Fed. Cir. 1999) (underline added). "The statute's [Back Pay Act's] language was intended to provide a monetary remedy for wrongful reductions, removals, suspensions, and 'other unwarranted or unjustified personnel actions affecting pay or allowances'". United States v. Testan, 424 U.S. 392, 405 (1976). Any personnel action is "wrongful", "unwarranted or unjustified" if such action violates any one of our federal statutes or regulations or any one of our U.S. Constitution's provisions, such as in this case.

Here, in addition to the Back Pay Act, the Tucker Act, Worthington, and Testan, our U.S. Supreme Court's *expressio unius est exclusio alterius* case law is another controlling authority concerning the threshold issue that **the Board lacks jurisdiction over Agustin's claims for violations of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2), and that this Court has jurisdiction over such claims**. Our U.S. Supreme Court's new, recent, and relevant interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz is another controlling authority, and leaves no doubt, as to the correctness of the Worthington holding with respect to the Board's very limited jurisdiction and its lack of jurisdiction over Agustin's claims. Defendant's briefs and filings very noticeably fail to identify any provision that grants the Board jurisdiction over Agustin's claims for violations of 5 USC Sections 6307, 6303, and 8118(c), and 5 CFR 630.401(a)(1), (2). This honorable Court must apply and uphold our

Worthington case law, our Testan-Back Pay Act case law, and our U.S. Supreme Court's *expressio unius est exclusio alterius* case law with respect to the Board's very limited jurisdiction, and should rule that the Board lacks jurisdiction over Agustin's claims and that this Court has jurisdiction over such claims.

PLEASE ALSO KINDLY TAKE NOTICE that our U.S. Supreme Court's new, recent, and relevant interpretation of its *expressio unius est exclusio alterius* case law in Swierkiewicz is also another controlling authority in the instant case with respect to a federal employee's right to a private cause of action in the appropriate federal court under the Back Pay Act and the Tucker Act, when the pay or emoluments of his or her position have been wrongfully withheld in violation of a money-mandating, applicable law or regulation such as 5 USC Section 6307, 6303, or 8118(c), or 5 CFR 630.401(a)(1), (2)--a violation which is not "appealable to the Board under any law, rule, or regulation" (5 USC Section 7701(a)) and is not covered under the CSRA. In 5 USC Section 6307, Congress established a constitutionally-protected, statutory right to sick leave to qualified federal employees where an absence is due to an injury or illness. See Note 1 below.

Note 1: "Qualifying [federal] employees are guaranteed" statutory rights or entitlement to sick leave with pay "by the Family and Medical Leave Act [(FMLA) (5 USC Section 6382(a)(1)(D)]", the Sick Leave Act (5 USC Section 6307), and 5 USC Section 8118(c). See Ragsdale v. Wolverine World Wide, Inc., 122 S.Ct. 1155 (2002). "The FMLA [5 USC Section 6382(a)(1)(D)]", 5 USC Section 6307, and 5 USC Section 8118(c), "'create[] a substantive entitlement to sick leave'" with pay to qualifying federal employees. See Lizzi v. Alexander, 255 F.3d 128, 135 (4th

Cir. 2001) (quoting Chittister, 226 F.3d at 229). "The Leave Act, 5 U.S.C. Section 6301 et seq., establishes entitlement to annual leave, sick leave, and holiday pay for most Federal employees." Thiess v. Witt, 100 F.3d 915, 917 (Fed. Cir. 1996). The Sick Leave Act (5 USC Section 6307) grants qualified federal employees "the right to take sick leave" with pay. See (Hambsch v. U.S., 490 U.S. 1054, 1058 (1989), (Justice O'CONNOR, with whom Justice SCALIA and Justice KENNEDY join, dissenting.)) **UNQUOTE**.

QUOTED FROM pages 3-6 of Agustin's "7/11/02 Reply" or "REPLY TO: 'DEFENDANT'S RESPONSE TO NEW AUTHORITY PRESENTED BY PLAINTIFF IN SUPPORT OF HIS SICK LEAVE RIGHTS VIOLATION CLAIM", which was **filed by leave of the Judge on 06/17/2003**, Docket Entry No. 73.

OUR U.S. SUPREME COURT'S QUITE RECENT ANNOUNCEMENT OR REANNOUNCEMENT OF ITS "FAIR INTERPRETATION" RULE OR "FAIR INFERENCE"-CASE LAW IN UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE, 123 S.CT. 1126, 1132 (2003) (or "WHITE MOUNTAIN"), WHICH IS A QUITE CONTROLLING AUTHORITY IN THE INSTANT CASE WITH RESPECT TO THE CLAIMS COURT'S JURISDICTION OVER AGUSTIN'S CLAIMS

QUOTE:

[Page 1] **PLAINTIFF'S EX PARTE MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S (1) REANNOUNCEMENT OF ITS TUCKER ACT JURISDICTION-CASE LAW AND (2) ITS ANNOUNCEMENT OF ITS NEW "FAIR INTERPRETATION" RULE OR "FAIR INFERENCE" CASE-LAW IN UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE, [123 S.CT. 1126, 1132 (2003)]**

Pursuant to this Court's Rule 7(b), Plaintiff (or "Agustin") respectfully requests or moves this honorable Court to take judicial notice of our U.S. Supreme Court's (1) reannouncement of its Tucker Act jurisdiction-case law and (2) its announcement of its new "fair interpretation" rule or "fair inference"-case law in United States v. White Mountain Apache Tribe, [123 S.Ct. 1126 (2003)] (or "White Mountain")[], which is quite relevant and controlling authority to the outcome of this case, and which compels and requires a decision that Agustin should prevail in the instant case...

[Page 3] **Pursuant to the Tucker Act and the Back Pay Act, and based on White Mountain, this Court has jurisdiction over Agustin's claims that the Navy's 4-12-95 "wrongful" (Testan, 424 U.S., at 405), unjustified, or unwarranted personnel action**[1]

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[1] At the time of the Navy's 4-12-95 personnel action, the Navy was fully aware of and had total and complete knowledge, (see 5 USC Section 8147(b)), that Agustin was incapacitated for work and that he was receiving and was in great need of continuous medical care or treatment due to his Federal Employees' Compensation Act (FECA)-approved occupational injuries, which was approved on April 20, 1994. (Agustin was on approved, FECA continuation of pay (COP) from 12-15-93 to 1-31-94; on approved, FECA compensation from 2-1-94 to 1-22-95; and on approved sick leave from 1-23-95 to 4-21-95.) **On 2-16-95, Agustin** provided administratively acceptable evidence and submitted to the Navy his Application for Sick Leave--to use "sick leave due to occupational injury" (exhibit 62), and he **had triggered the Navy's 5 USC Sections 6307, 6303, and 8118(c), 5 CFR Section 630.401(a)(1), (2), and 20 CFR Section 10.310(a) legal duties and obligations, as well as its constitutional duties and obligations**. On 2-28-95, the Navy "approved" his request until his sick leave and annual leave accounts "become[] exhausted" (exhibit 6). Exhibits 62 and 6 are clear and convincing evidence or records that the Navy's statutory and regulatory duties and obligations under 5 USC Sections 6307, 6303, and 8118(c), 5 CFR Section 630.401(a)(1), (2), and 20 CFR Section 10.310(a) had been triggered, and that the Navy refused or failed to obey our laws and to fulfill its statutory and regulatory duties and obligations. These exhibits (exhibits 62 and 6) were before the attention of the Navy prior to Agustin's separation from employment, and are now before this Court. (Exhibits 6 and 13 were attached to Agustin's "COMPLAINTS OR CLAIMS...", which was filed on 6-6-00; and exhibit 62 was attached to "PLAINTIFF'S REPLY...", which was filed on 9-6-01). On 4-21-95, the effective date of the Navy's 4-12-95 disciplinary removal action, which did not involved any charge of any misconduct nor the use of alcohol or illegal drugs, (it is undisputed and indisputable by the Defendant that all his absence from work was all approved and all for the enjoyment or exercise of his statutory and regulatory, FECA and sick leave rights or benefits), he has unused and remaining 252.9 hours of accumulated sick leave and 444.8 hours of accumulated annual leave (see exhibit 13), which he has statutory, regulatory, and constitutional rights

had violated 5 USC Sections 6307, 6303, and 8118(c), 5 CFR Section 630.401(a)(1), (2), and 20 CFR Section 10.310(a) (as it existed on 4-12-95)[2], and Agustin's rights pursuant to these authorities.

First, in White Mountain, our U.S. Supreme Court reannounced its Tucker Act jurisdiction-case law and declared that:

> "The Tucker Act contains…a waiver [of sovereign immunity]…giving the Court of Federal Claims jurisdiction to award damages upon proof of 'any claim against the United States founded either

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to use due to occupational injury under 5 USC Sections 6307 and 8118(c), 5 CFR Section 630.401(a)(1), (2), and 20 CFR Section 10.310(a) and under his substantive, constitutional rights to medical care or treatment, to equal protection of the laws, and to protection from the unconstitutional taking of his property, rights, or interests without just compensation—his constitutionally-protected rights or benefits which the Navy had quite clearly violated through its 4-12-95 "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)).

[2] As of April 1, 1998, 20 CFR Section 10.310(a) states that: "An employee who sustains a job-related disability may use sick or annual leave or both to avoid interruption of income." 20 CFR Section 10.310(a) (1998).

upon the Constitution, or any Act of Congress'".

White Mountain, [123 S.Ct., at 1132], (citation omitted).

The Back Pay Act is such an Act of Congress, which "creates a substantive right enforceable against the government by a claim for money damages." White Mountain, [at 1132]. See our U.S. Supreme Court's "clearly established precedents" (Packer, at 365) or governing, Back Pay Act-case law at footnote 4.

And 5 USC Sections 6307, 6303, and 8118(c), 5 CFR Section 630.401(a)(1), (2), and 20 CFR Section 10.310(a) are "applicable law[s], rule, [or] regulation[s]" within the meaning of the Back Pay Act. 5 USC Section 5596(b)(1).

Second, in White Mountain, the Supreme Court also announced its new "fair interpretation" rule or "fair inference"-case law, which is quite relevant and controlling in the instant case:

> "This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. 'Because the Tucker Act supplies a waiver of sovereign immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in a manner appropriate to waivers of sovereign immunity'...that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages...a fair inference will do."

White Mountain, [at 1132], (citation omitted).

In a Tucker Act claim founded upon any Act of Congress, only a lower "fair interpretation" or "fair inference" standard is required that such Act or regulation creates a substantive right for money damages against the government. In the instant case, the plain, clear, and unambiguous language and mandate of 65 Statute 681, Section 204 (codified at 5 USC Section 6307) or 5 CFR Section 630.401(a)(1), (2) provide a much more higher standard—a quite clear and convincing, unequivocally expressed, plain, clear, and unambiguous statutory or regulatory language and mandate that creates a substantive right for money damages against the government.[3] Unlike the claimants in Testan, who were claiming benefits or money damages for positions to which they were not duly appointed and which involved "allegedly improper job classification under the Classification Act" (White Mountain, [at 1135]), here, Agustin "has been denied the benefit of the position to which he was appointed". Testan, 424 U.S., at

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[3] The plain, clear, and unambiguous, clear statutory mandate of the Sick Leave Act or 65 Statute 681, Section 204, the Statute from which 5 USC Section 6307 was codified, unequivocally expressed that: "(a) Officers and employees to whom this title applies **shall be entitled to sick leave with pay**...(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, **shall accumulate and be available for use** in succeeding years." 65 Statute 681, Section 204(a), (b), (bold and underline added). 5 CFR Section 630.401(a) gives federal employers no discretion to deprive sick leave rights or benefits when an employee provides "administratively acceptable evidence" (5 CFR Section 630.403(a)) that he is incapacitated for work due to illness or injury, or receiving medical treatment, and it very clearly and very explicitly unequivocally commands in unmistakable mandatory language that: "[A]n agency **must grant sick leave** to an employee when the employee--(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth". 5 CFR Section 630.401(a)(1), (2), (bold and underline added).

402, (underline added).[4]

As Agustin has presented before, **in the instant case, the Navy's 4-12-95 personnel action was "wrongful" within the meaning of Testan and must be set aside** because it had quite clearly violated: (1) 5 USC Sections 6307, 6303, and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a), and Agustin's Due Process-protected liberty interests (2) to substantive constitutional right to medical care or treatment, (3) to equal protection of the laws, (4) to protection from the unconstitutional taking of his constitutionally-protected property, rights, or interests (his 252.9 hours of unused and remaining, accumulated sick leave and his leave accrual rights or benefits while on leave with pay pursuant to the sick leave and annual leave accrual provisions of 5 USC Sections 6307 and 6303) without just compensation, and (5) to continuous federal employment without violation of an employee's statutory and regulatory rights. Here, given the undisputed and indisputable fact that the Navy was fully aware and had total and complete knowledge that Agustin was injured, in pain, and incapacitated, was receiving and was in great need of continuous medical treatment, the Navy "acted with 'deliberate indifference' to [Agustin's] health or safety...[w]e may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious" and the Navy's 4-12-95 action or conduct violated Agustin's "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" See Hope v. Pelzer, 122 S.Ct. 2508, 2514, 2515 (2002) (citations omitted)). **"With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eight**

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[4] "'The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it...'" White Mountain, page 11 of slip opinion, (quoting Testan, 424 U.S., at 402).

Amendment imposes". Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002), (bold and underline added)). **UNQUOTE**.

QUOTED FROM pages 1, 3-7 of Agustin's 03/14/2003 "White Mountain Motion" or "MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S (1) REANNOUNCEMENT OF ITS TUCKER ACT JURISDICTION-CASE LAW AND (2) ITS ANNOUNCEMENT OF ITS NEW "FAIR INTERPRETATION" RULE OR "FAIR INFERENCE" CASE-LAW IN UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE, [123 S.Ct. 1126 (2003]", (which was filed on 03/14/2003, Docket Entry No. 48).

See White Mountain slip opinion at U.S. Supreme Court's internet web site, or: http://www.supremecourtus.gov/opinions/02pdf/01-1067.pdf

AGUSTIN'S CONSTITUTIONAL CLAIMS THAT THE NAVY VIOLATED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS AND HIS DUE PROCESS RIGHT TO CONTINUOUS FEDERAL EMPLOYMENT

EXCERPTS FROM Agustin's 03/31/2003 Next Wave Reply at pages 6-9, Docket Entry 54, which was filed on 03/31/2003.

QUOTE: [Page 6] Another reason why the Navy's 4-12-95 action must be set aside is because the Navy's 4-12-95 violation of his fundamental and substantive Due Process right to freely and lawfully enjoy or exercise his statutory and regulatory sick leave rights or benefits ***also violated*** his constitutional right to equal protection of the laws. Like "all persons [or federal employees] similarly situated" (Cleburne, 473 U.S., at 439), our U.S. Constitution grants Agustin the same constitutional right and guarantee to equal protection of the laws to enjoy the same sick leave rights or benefits, which the Navy had an unequivocally expressed--"must grant"--unmistakable and mandatory regulatory duty to grant to Agustin, but which the Navy had quite clearly violated. See 5 CFR Section 630.401(a)(1), (2).

Although 65 Statute 681, Section 204 and 5 CFR Section 630.401(a)(1), (2) "establish[] no explicit classification and do[] not expressly distinguish between claimants [or federal employees]", the Navy's interpretation and application of 65 Statute 681, Section 204 and 5 CFR Section 630.401(a)(1), (2), through its "established [Navy] procedure" (see Logan, infra, at 436)--the Navy's "CPI (Civilian Personnel Instructions) 752 (see exhibit 4)--"unambiguously divides…claimants [or federal employees]…into two discrete groups that are accorded

radically disparate treatment". See Logan v. Zimmerman, 455 U.S. 422, 438 (1982) (Justice BLACKMUN, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR join). The Navy unambiguously divides all similarly situated federal employees who have provided "administratively acceptable evidence" (5 CFR Section 630.403(a)) that they are "receiv[ing] medical...treatment" or are "incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth" (5 CFR Section 630.401(a)(1), (2)) into two discrete groups that are accorded radically disparate treatment: **(A1) those whose sick leave rights or benefits "must" be granted**, and **(A2) those whose sick leave rights or benefits "must" not be granted** (see 5 CFR Section 630.401(a)(1), (2)); and **(B1) those who could**, and **(B2) those who could not**, exercised the same fundamental and substantive Due Process right to freely and lawfully enjoy or exercise their statutory and regulatory rights or benefits without punishment or disciplinary action. The Navy's classification of all similarly situated federal employees that are accorded radically disparate treatment with respect to their fundamental and substantive Due Process right to enjoy or exercise their constitutionally protected statutory and regulatory sick leave rights or benefits does not serve any legitimate or "'important governmental objectives'" and is not rationally or "'substantially related to the achievement of'" any governmental objectives. Tuan Anh Nguyen v. Immigration and Naturalization Service, 533 U.S. 53, 60 (2001), (citations omitted). In the instant case, the Navy's classification system with respect to all similarly situated federal employees' fundamental and substantive Due Process right to enjoy or exercise their statutory and regulatory rights or benefits provided by 65 Statute 681, Section 204 and 5 CFR Section 630.401(a)(1), (2) "runs afoul of the lowest level of permissible equal protection scrutiny". Logan, at 439.

"Here…it is the [Navy's classification) system itself that destroy[ed] [Agustin's] property interest, by operation of [its "established [Navy] procedure"--its Civilian Personnel Instructions]". Logan, id., at 436.

Another reason why the Navy's 4-12-95 action must be set aside is because it ***also violated*** Agustin's fundamental and substantive Due Process right to continuous federal employment without violation of his statutory and regulatory rights. Here, the Navy's 4-12-95 action was ***unconstitutional*** because the Navy's action was constitutionally invalid—the Navy unconstitutionally took its wrongful, unjustified, or unwarranted personnel action based solely on his "constitutionally protected conduct" (Arnett, at 163)--his approved and lawful enjoyment or exercised of his FECA and sick leave rights or benefits. Laws, regulations, rules, or federal agency actions "that make unlawful [or punishable] a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." Houston v. Hill, 482 U.S. 451, 459 (1987).

The bottom line is, **the Navy is not above the law**, and its 4-12-95 "wrongful…removal[]" or "'unwarranted or unjustified personnel action[]'" (Testan, at 405) against Agustin must be set aside because it is quite crystal clear that such action ***had violated*** our federal laws, our federal regulations, our U.S. Constitution, and Agustin's rights pursuant to these authorities. Based on all the foregoing, our U.S. Supreme Court's recent announcement or reannouncement of its "clearly established precedents"-case law (Packer, 123 S.Ct., at 365) and its federal agency action ***in violation*** of "any law"—such action must be set aside-case law in Next Wave, at pages 5 to 6 of slip opinion, are quite relevant and controlling authorities to the outcome of this case.

Under any and all circumstances, if the Navy or any federal agency has any problem whatsoever in performing its service to the public and obeying all our federal laws and federal regulations at the same time, the quite easy and simple solution is, it should come to our U.S. Congress for whatever relief or exemption it needs, rather than acting as if it is above the law, ***and violating***, and disobeying, our U.S. Congress' duly enacted laws and our federal regulations, with impunity. "It is Congress that has the authority to change the statute, not the courts." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 484 (1992). **UNQUOTE**.

QUOTED FROM pages 6-9 of Agustin's 03/31/2001 Next Wave Reply, Docket Entry 54, which was filed on 03/31/2003.

OUR U.S. SUPREME COURT'S QUITE RECENT ANNOUCEMENT OR REANNOUCEMENT OF ITS TAKINGS-CASE LAW IN BROWN V. LEGAL FOUNDATION OF WASHINGTON, 123 S.CT. 1406 (2003), WHICH IS A QUITE CONTROLLING AUTHORITY IN THE INSTANT CASE.

QUOTE:

[Page 1] **PLAINTIFF'S EX PARTE MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S REANNOUNCEMENT OF ITS FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE-CASE LAW IN BROWN V. LEGAL FOUNDATION OF WASHINGTON, [123 S.CT. 1406 (2003)]**

Pursuant to this Court's Rule 7(b), Plaintiff (or "Agustin") respectfully requests or moves this honorable Court to take judicial notice of our U.S. Supreme Court's reannouncement of its Fifth Amendment's Just Compensation Clause-case law in Brown v. Legal Foundation of Washington, [123 S.Ct.1406 (2003)] (or "Brown")[], which is another controlling authority that compels and requires a decision that Agustin should prevail with respect to his unconstitutional taking-just compensation claim in the instant case…

[page 7] In Brown, our U.S. Supreme Court again reannounced that: "'The text of the Fifth Amendment…requires the payment of compensation whenever the government acquires private property for a public purpose…[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate its former

owner". Brown, page 14-15 of slip opinion, (citation omitted).

Agustin respectfully submits to this honorable Court that (1) his right or entitlement to use as sick leave benefits his "252.90" accumulated sick leave and his "444.80" hours of accumulated annual leave pursuant to 5 USC Sections 6307 and 5 CFR Section 630.401(a)(1), (2); (2) his right or entitlement to accrue sick leave and annual leave while on sick leave with pay status pursuant to the accrual provisions of 5 USC Sections 6307 and 6303; and (3) his unused and remaining, "252.90" hours of accumulated sick leave on 4-21-95, (see exhibit 13), are constitutionally protected property interests within the meaning of our Fifth Amendment's Just Compensation Clause, which the Navy unconstitutionally took away from him without just compensation through its 4-12-95 "wrongful" (Testan, 424 U.S., at 405), "unjustified or unwarranted" (5 USC 5596(b)(1)) personnel action.[1] **UNQUOTE**.

QUOTED FROM pages 1 and 7 of Agustin's "03/31/2003 Brown Motion" or "MOTION FOR THIS COURT TO

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[1] "[G]overnment action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'" First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987), (citation omitted). In the instant case, "the government activities have already worked a taking of all use of [Agustin's] property". First English, id. at 321. "[T]emporary takings which...deny a [property owner] all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." First English, id., at 318. "[P]roperty...also consists of 'the group of rights which the so-called owner exercises in his dominion of physical thing' such as 'the right to possess, use and dispose of it'''. Philips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998), (underline added), (citation omitted).

TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S REANNOUNCEMENT OF ITS FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE-CASE LAW IN BROWN V. LEGAL FOUNDATION OF WASHINGTON, [123 S.Ct. 1406 (2003)]", which was filed on 03/31/2003, Docket Entry No. 55.

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QUOTE:

[Page 2] In Brown, our U.S. Supreme Court announced that:

> "[T]he text of the Fifth Amendment imposes **two conditions** on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." Brown, [123 S.Ct., at 1417]...(bold and underline added), (quoting our Fifth Amendment's Just Compensation Clause). "It applies to the States as well as to the Federal Government."

Brown, at [1417], n. 6, (citation omitted).

Brown is relevant and controlling in this case, because, for Agustin to prevail on his unconstitutional taking-without just compensation claim, which is properly before this Court, these **two conditions** must be satisfied.

With respect to the first condition, in Agustin's case, "the first condition is unquestionably satisfied". Brown, id., at [1417]. The Navy's 4-12-95 personnel action effected and authorized a permanent physical tal ng for public use of Agustin's constitutionally protected property, rights, or

interests.[2] Given the undisputed and indisputable facts in the

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[2] On 2-16-95, Agustin provided the Navy with administratively acceptable evidence, he submitted his application for sick leave "due to occupational injury" (exhibit 62), and he had triggered the Navy's sick leave duties and obligations under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), as well as its constitutional duties and obligations under our U.S. Constitution. On 2-28-95, the Navy "approved" Agustin's sick leave application until his sick leave and annual leave accounts "become[] exhausted" (exhibit 6). On 4-12-95 (the date of the Navy's relevant personnel action), and through and after 4-21-95 (the effective date of the Navy's 4-12-95 personnel action), Agustin was "receiv[ing] medical...treatment" and was "incapacitated for the performance of duties by physical or mental illness, [or] injury" (5 CFR Section 630.401(a)(1), (2)). See exhibit 14--Dr. Chattha's 3/6/95 medical report, which was attached to "COMPLAINANT'S ADDITIONAL PLEADING..." which was filed on 6-13-00. Agustin was on approved sick leave from 1-23-95 to 4-21-95 due to his Federal Employees' Compensation Act (FECA)-approved occupational injuries. On 4-21-95, Agustin has unused and remaining "252.90" hours of accumulated sick leave and "444.80" hours of accumulated annual leave. See exhibit 13. In the instant case, Agustin's "entitlement to [sick leave] benefits had been established" (American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 990 (1999)), and "the interest of [Agustin] in continued receipt of these [sick leave] benefits is a statutorily created 'property' protected by the Fifth Amendment" (Mathews v. Eldridge, 397 U.S. 319, 332 (1976) (citation omitted)). On 4-21-95, the Navy unconstitutionally took Agustin's constitutionally protected property, rights, or interests without just compensation, in violation of all the above mentioned, money-mandating federal statutes and federal regulations, our U.S. Constitution's provisions, our U.S. Supreme Court's governing law, and Agustin's rights pursuant to these authorities.

Like under the Family and Medical Leave Act (FMLA), under the Sick Leave Act, "[t]o trigger employer's [Sick Leave Act duties and] obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave". See Ragsdale v. Wolverine, 122 S.Ct. 1155, 1166 (2002) (Justice O'Connor, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting), and see, accord, 5 CFR Sections 630.401, 402, and 403.

instant case, which are needed and necessary for a fair and full hearing and adjudication of this specific claim, here, the government physically took Agustin's constitutionally protected property, rights, or interests without just compensation in violation of our Fifth Amendment's Just Compensation Clause, through its 4-12-95 personnel action, "to promote the efficiency of the service" (exhibit 8) "in accordance with the provisions of references (a) [CPI (Civilian Personnel Instructions) 339] and (b) [CPI 752]" (exhibit 4). In the instant case, it is the "established [Navy] procedure" (Logan v. Zimmerman, 455 U.S. 422, 436 (1982))--the Navy's "CPI 339" and "CPI 752" (see exhibit 4)--which the Navy invoked in physically taking Agustin's constitutionally protected property, rights, or interests without just compensation...

[page 5] **With respect to the second condition**, the Supreme Court reannounced its Just Compensation Clause-case law and declared that:

> [1417] "'The text of the Fifth Amendment...requires the payment of compensation whenever the government acquires private property for a public purpose...[1418] When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate its former owner'".

Brown, at [1417-18], (citation omitted), (underline added).

Here, based on all the facts, records, and evidence in the instant case, it is unquestionable that the government

"has a categorical duty to compensate" Agustin for the permanent physical taking of his constitutionally protected property, rights, or interests without just compensation. Brown, at [1418].

With respect to what constitute property interests, the Supreme Court's governing law is that:

> "The protections of the Due Process Clause apply to the government deprivation of those perquisites of government employment in which the employee has a constitutionally protected 'property' interest." Gilbert v. Homar, 520 U.S. 924, 928 (1997). "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law [or federal law or federal regulations]'". Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985), (citation omitted); "[P]roperty...also consists of 'the group of rights which the so-called owner exercises in his dominion of physical thing' such as 'the right to possess, use and dispose of it'". Philips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998), (underline added), (citation omitted).

Pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307)[3], 5 USC Sections 6303 and 8118(c), 5

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[3] "(a) Officers and employees to whom this title applies **shall be entitled to sick leave with pay**...(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, **shall** accumulate and **be available for use** in succeeding years." 65 Statute 681, Section 204(a), (b), (bold and underline added).

CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), Agustin has a constitutionally protected property, rights, or interests "to…use" (Philips, id., at 170; and also see 65 Statute 681, Section 204) as sick leave benefits: his "252.90" hours of accumulated sick leave and his "444.80" hours of accumulated annual leave benefits. See exhibit 13. Pursuant to the leave accrual provisions of 5 USC Sections 6307 and 6303, Agustin has a constitutionally protected property, rights, or interests to accrue sick leave and annual leave while on sick leave with pay. And pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307) and 5 CFR Section 630.401(a)(1), (2), Agustin's unused and remaining, "252.90" hours of accumulated sick leave "'is the 'private property' of'" Agustin (Brown, at [1419], (citation omitted)), which he had very painstakingly and very slowly saved for years (like savings in a savings account), even on work days when he had aches and pains[4], as an insurance or statutorily granted protection--"sick leave with pay"--in case of illness or injury, which is a statutorily guaranteed right or entitlement granted by 65 Statute 681, Section 204. See exhibit 13. 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995) "plainly create[] such [] interest[s]" mentioned above. Loudermill, id., at 538., (citation omitted). Agustin's "claim for back pay is based upon" the Navy's 4-12-95 violation of all the said money-mandating statutes and regulations. Read v. United States, [254 F.3d 1064, 1067

[4] Prior to Agustin's 12-14-93 on-the-job injury (which was approved by the federal government as occupational injury under the Federal Employees' Compensation Act (FECA) on 4-20-94), Agustin had excellent attendance records and had been recognized and awarded five consecutive "ZERO SICK LEAVE" USAGE AWARDS for five continuous years, from 1985 to 1990, by his federal employer. A federal employee could save only a maximum of 104 hours of sick leave per year.

(Fed. Cir. 2001)], (or "Read").[5] "[I]t was that action [or violation of all the said money-mandating statutes and regulations, or "wrongful [or unlawful]...removal[]" (Testan, at 405))] that resulted in the termination of his pay" and the violation of his fundamental and substantive Due Process rights to medical care or treatment, to freely and lawfully enjoy or exercise his statutory and regulatory rights without punishment or disciplinary action, and to continuous federal employment without violation of his statutory and regulatory rights; and his constitutional rights to equal protection of the laws, and to protection from the unconstitutional taking of his constitutionally protected property, rights, or interests without just compensation. See Read, id., [at 1067]. In the instant case, "the government activities have already worked a [physical] taking of all use of [Agustin's] property" and "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective". See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315, 321 (1987).[6]...

[page 10] Based on all the facts, records, and evidence in the instant case, it is quite crystal clear that, in Agustin's case, the two conditions in Brown, at [1417], are "unquestionably satisfied". Id. "[T]he taking [in Agustin's case was] for a 'public use' and 'just compensation must be paid to [Agustin]". Id., (underline added). Agustin's just "[c]ompensation is measured by [his] pecuniary loss". See

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[5] See Read in the internet at http://www.ll.georgetown.edu/federal/judicial/fed/opinions/00opinions/00-5070.html

[6] Even "temporary takings which...deny a [property owner] all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." See First English, id., at 318.

Brown, at [1421]. **UNQUOTE.**

QUOTED FROM pages 2-3, 5-8, and 10 of Agustin's "04/22/2003 Brown Reply" or "REPLY TO: "DEFENDANT'S RESPONSE TO PLAINTIFF'S FIFTH MOTION TO SUBMIT NEW AUTHORITY", which was filed on 04/22/2003, Docket Entry No. 61, (Service: 4/18/03).

EXCERPTS FROM OUR U.S. SUPREME COURT'S GOVERNING, FEDERAL RULES OF APPELLATE PROCEDURES (FRAP) RULE 41(b)-CASE LAW IN Costelo v. United States, 365 U.S. 265, 285-286 (1961), (or "Costelo") AND IN Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or "Semtek"):

QUOTE: "[365 U.S. 265, 285] In Haldeman v. United States, 91 U.S. 584, 585-586, which concerned a voluntary nonsuit, this Court said, 'there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit...There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively.' A similar view applied to many dismissals on the motion [365 U.S. 265, 286] of a defendant. In Hughes v. United States, 4 Wall. 232, 237, it was said: 'In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.' See also House v. Mullen, 22 Wall. 42, 46; Swift v. McPherson, 232 U.S. 51, 56; St. Romes v. Levee Steam Cotton Press Co., 127 U.S. 614, 619; Burgett v. United States, 80 F.2d 151; Gardner v. United States, 71 F.2d 63. We do not discern in Rule 41 (b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for

failure of the plaintiff to satisfy a precondition." Costelo, 365 U.S. 265, 285-286. **UNQUOTE**.

QUOTED FROM footnote 8, at page 6 of Agustin's 05/06/2003 Reply, which was filed on 05/06/2003, Docket Entry No. 65.

___quote separator___

QUOTE: "[Page 503] To begin with, Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal (a dismissal is 'upon the merits', with three stated exceptions, unless the court 'otherwise specifies'...And even apart from the purely default character of Rule 41(b), it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right', 28 USC Section 2072(b)...[page 505] an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice'''. Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503, 505 (2001). **UNQUOTE**.

QUOTED FROM footnote 9, at pages 6-7 of Agustin's 05/06/3003 Reply, which was filed on 05/06/2003, Docket Entry No. 65.

EXCERPTS FROM AGUSTIN'S 05/06/2003 MOTION TO AMEND TO INCLUDE CLAIM 9 AND CLAIM 10 BASED ON QUITE RECENT DEVELOPMENT--OUR U.S. SUPREME COURT'S QUITE RECENT ANNOUNCEMENT, REANNOUCEMENT, OR CLARIFICATION OF ITS CONSTITUTIONALLY PROTECTED "SPEECH"-CASE LAW IN VIRGINIA V. BLACK, 123 S.CT. 1536 (2003) AND ITS "NO CONSTITUTIONALLY SIGNIFICANT DISTINCTION"-CASE LAW IN FRANCHISE TAX BD. OF CAL. V. HYATT, 123 S.CT. 1683 (2003)--WHICH ARE QUITE RELEVANT AND QUITE CONTROLLING AUTHORITIES IN THE INSTANT CASE; (MOTION WAS FILED ON /5/06/2003, DOCKET ENTRY NO. 66):

QUOTE:

[Page 1] **PLAINTIFF'S EX PARTE MOTION TO AMEND HIS COMPLAINT TO INCLUDE: THE NAVY'S 4-12-95 VIOLATION OR INFRINGEMENT OF HIS FUNDAMENTAL AND SUBSTANTIVE DUE PROCESS RIGHTS OR LIBERTY INTERESTS [CLAIM 9] TO FREELY AND LAWFULLY ENJOY OR EXERCISE CONSTITUTIONALLY PROTECTED CONDUCT AND [CLAIM 10] TO CONTINUOUS FEDERAL EMPLOYMENT WITHOUT VIOLATION OF HIS STATUTORY AND REGULATORY RIGHTS**

Pursuant to this Court's Rule 7.(b)(1) and based on our U.S. Supreme Court's very recent announcement or reannouncement of its constitutional protection-case law in

Virginia v. Black, [123 S.Ct. 1536, 1551 (2003)] (or "Black")[1] and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, [123 S.Ct. 1683, 1690 (2003)] (or "Hyatt")[2], Plaintiff (or "Agustin") respectfully requests or moves this honorable Court to grant this motion to amend his Complaint and to include the two (2) following claims in the instant Complaint: **CLAIM 9**—the Navy's 4-12-95 violation or infringement of Agustin's fundamental and substantive Due Process right or liberty interest to enjoy or exercise his statutory and regulatory rights pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2)

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[1] See our U.S. Supreme Court's very recent Black slip opinion at the internet at http://www.supremecourtus.gov/opinions/02pdf/01-1107.pdf

Under our U.S. Constitution's First and Fifth Amendments, the same guarantee of constitutional protection applies both to violation or infringement of "constitutionally protected" "speech" and to violation or infringement of "constitutionally protected conduct" (Arnett v. Kennedy, 416 U.S. 134, 163 (1974), and therefore, Black and Hyatt (below) are quite relevant in the instant case with respect to Agustin's claim that the "cause" of the Navy's 4-12-95 unjustified or unwarranted personnel action was "constitutionally protected conduct", that such action was unconstitutional, that it had violated Agustin's fundamental and substantive Due Process right or liberty interest to freely and lawfully enjoy or exercise his statutory and regulatory rights, and that it had also violated Arnett's "constitutionally protected ["speech" and] conduct"-case law. Arnett, at 162, 163.

[2] See Hyatt slip opinion at http://www.supremecourtus.gov/opinions/02pdf/02-42.pdf

In the instant case, Black, Hyatt, and Arnett are controlling authorities with respect to the quite relevant issue as to whether: in our U.S. Constitution's guarantee of constitutional protection under our First and Fifth Amendments, there is "no constitutionally significant distinction" or difference between constitutionally protected speech and constitutionally protected conduct. Hyatt, at page 10 of slip opinion.

and 20 CFR Section 10.310(a) (1995], and **CLAIM 10**—the Navy's 4-12-95 violation or infringement of Agustin's fundamental and substantive Due Process right or liberty interest to continuous federal employment without violation of his statutory and regulatory rights.[3]

Based on the "properly pleaded" teaching of Roth v. United States, CFC No. 00-638C (4-15-03), (or "Roth")[4], Agustin, a pro se, still in pain and disabled complainant, who is suffering from major depression, post traumatic stress disorder, and organic brain syndrome is filing this motion to timely and properly plead these two claims before this honorable Court, and to give the Defendant a fair and full opportunity to respond to these two claims [**CLAIM 9** and

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[3] These two constitutional claims would be **CLAIM 9** and **CLAIM 10** in the instant Complaint. Please kindly refer to Plaintiff's Motion [Service: 8/30/01], which was filed on this Court's docket on 08/31/01, docket entry 27, wherein plaintiff's other 8 claims are enumerated.

[4] See Roth opinion in the internet at http://www.uscfc.uscourts.gov/Opinions/Gibson/03/Gibson.rothxsmsj.pdf

In the instant case, as in Roth, Agustin has alleged and timely and properly pleaded "injury in fact" and he has "Article III" "standing" within the meaning of Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) based on the Navy's 4-12-95 violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), which is remediable under the Tucker Act and the Back Pay Act. The Tucker Act and the Back Pay Act contain an unequivocally expressed, waiver of sovereign immunity, and the Back Pay Act is an "Act of Congress" within the meaning of the Tucker Act. "It is well established that a party may challenge a violation of federal statute in federal court if it has suffered 'injury that fairly can be traced to the challenged action of the defendant'". Primate Protection League v. Tulane Ed. Fund, 500 U.S. 72, 77 (1991), (citation omitted). Also see Allen v. Wright, 468 U. S. 737, 751 (1984).

CLAIM 10] and be heard, although Agustin has been mentioning these two claims in his filings.

Our U.S. Supreme Court's governing law that the inartful pleadings of a pro se complainant must be held "to less stringent standards than formal pleadings drafted by lawyers" (Haines v. Kerner, 404 U.S. 519, 520 (1972)), and must be "constru[ed]...liberally" (Boag v. MacDougal, 454 U.S. 364, 365 (1982)), is a controlling authority with respect to this motion. Agustin has a constitutional, Due Process right to have his day in court with respect to these two (2) constitutional claims based on the Navy's 4-12-95 violation of Agustin's "clearly established statutory or constitutional rights" upon which relief can be granted. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A court may consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation. See Chitimacha Tribe of Louisiana v. Harry L. Laws Company, 690 F. 2d 1157, 1163 (5th Cir. 1982), which is a controlling authority compelling the granting of this motion.

Forman v. Davis, 371 U.S. 178, 182 (1962) is another controlling authority which compels and requires the granting of the instant motion. Here, based on Forman v. Davis, there is no reason why this Court should deny the instant motion. Most importantly, another reason why the instant motion should be granted is because our U.S. Supreme Court's very recent announcement or reannouncement of its constitutional protection-case law in Black and its "no constitutionally significant distinction"-case law in Hyatt are not available to Agustin at the time of filing of the instant Complaint.

Agustin respectfully requests this honorable Court to take judicial notice of Black and Hyatt, which ~~are~~ quite

relevant and controlling authorities to Agustin's **CLAIM 9** and **CLAIM 10**. The governing law of the Supreme Court of the United States, like "the law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter which the courts of the United States are bound to take judicial notice". See Lamar v. Micou, 114 U.S. 218, 223 (1885).

The Navy's 4-12-95 personnel action "chills constitutionally protected" exercise of statutory and regulatory rights "because of the possibility that" federal employers "will" punish—"and potentially" removed—"somebody engaging only in lawful" conduct "at the core of what the [Fifth] Amendment is designed to protect" (Virginia v. Black, [123 S.Ct. 1536, 1547, 1551 (2003)] (or "Black"). "[T]he protection of [constitutionally protected]...speech" in Black (at 1547] and the protection of "constitutionally protected ["speech" and] conduct" in Arnett (416 U.S. 134, 162, 163) has "no constitutionally significant distinction" or difference. See Franchise Tax Bd. of Cal. v. Hyatt, [123 S.Ct. 1683, 1690 (2003) (or "Hyatt").[5] Agustin respectfully submits to this honorable Court that our U.S. Supreme Court's quite recent announcement of its "no constitutionally significant distinction" reasoning or case law in Hyatt applies with equal force to Agustin's **CLAIM 9** and **CLAIM 10**.

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[5] In the instant case, Black, Arnett, and Hyatt are controlling authorities with respect to the quite relevant issue as to whether: in our U.S. Constitution's guarantee of constitutional protection, there is "no constitutionally significant distinction" or difference between constitutionally protected speech and constitutionally protected conduct. Hyatt, at page 10 of slip opinion [123 S. Ct., at 1690].

Based on Agustin's constitutionally protected conduct[6], which was the sole cause for the Navy's 4-12-95 "wrongful [or unlawful]...removal[]" (Testan, at 405)) or "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)) against Agustin, such action was void ab initio, unlawful, and unconstitutional. Here, it is undisputed and indisputable by the Defendant that Agustin's exercised of his fundamental and substantive Due Process right or liberty interest to enjoy his statutory and regulatory rights pursuant to all of the said money-mandating statutes and regulations was "constitutionally protected conduct." Arnett v. Kennedy, 416 U.S. 134, 163 (1974). Agustin, who was "[a] federal employee in the competitive service may be removed or demoted 'only for such cause as will promote the efficiency of the service.'" Bush v. Lucas, 462 U.S. 367, 386 (1983), (underline added). "We hold that the language 'such cause as will promote the efficiency of the service' in the [Lloyd-La Follette] Act excludes constitutionally protected speech...Colten v. Kentucky, 407 U.S., at 111...[and] did not intend to include within that term any constitutionally protected conduct." Arnett v. Kennedy, 416 U.S. 134, 162, 163 (1974), (underline added).[7] The Navy's

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[6] Agustin's exercised of his Federal Employees' Compensation Act (FECA) continuation of pay rights from 12-15-93 to 1-31-94, his FECA compensation rights from 2-1-94 to 1-22-95, and his 65 Statute 681, Section 204 rights from 1-23-95 to 4-21-95, was "constitutionally protected conduct". Arnett, at 163.

[7] Like the First Amendment's guarantee of constitutional protection to "constitutionally protected" "speech", which our U.S. Supreme Court has very recently reannounced in Black, Agustin's "constitutionally protected conduct" (Arnett, 416 U.S., at 163)--his exercised of his fundamental and substantive Due Process right or liberty interest to a free and lawful enjoyment of his statutory and regulatory rights--is guaranteed the same constitutional protection, or is equal to, among other "constitutionally protected conduct" (Arnett, id.), such as: "the right of assembly" (Coates v. Cincinnati, 402 U.S. 611, 614 (1971)); "freedom...to oppose or challenge police action" (Houston v. Hill, 482

4-12-95 personnel action was void ab initio, unlawful, and unconstitutional, had violated Agustin's fundamental and substantive Due Process right or liberty interest to enjoy or exercise his statutory and regulatory rights, and had violated Arnett's governing "constitutionally protected conduct"-case law. Arnett, at 163. Here, the Navy's 4-12-95 personnel action was unconstitutional on its face because it "authorize[d] the punishment of constitutionally protected conduct".[8] Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

Based on Black and Hyatt, and our U.S. Supreme Court's governing law or "clearly established precedents" (Early v. Packer, 123 S.Ct. 362, 365 (2002)), "constitutionally protected" speech and conduct are all "constitutionally protected interests" under our U.S. Constitution, and the Navy's 4-12-95 personnel action had violated Agustin's fundamental and substantive Due Process rights or liberty interests **[CLAIM 9]** to enjoy or exercise his statutory and regulatory rights pursuant to all the said money-mandating statutes and federal regulations, and **[CLAIM 10]** to continuous federal employment without violation of his statutory and regulatory rights. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

U.S. 451, 462-463 (1987)); or "the freedom to loiter for innocent purposes", "the freedom of movement", or "the right to move 'to whatsoever place one's own inclination may direct'" (City of Chicago v. Morales, 527 U.S. 41, 53, 54 (1999), (citation omitted).

[8] In the instant case, the Navy's "ADVANCE NOTICE OF PROPOSED SEPARATION" (exhibits 4-5) was "a disciplinary action…It's a disciplinary action as far as the Board is concerned and that's what matters." [MSPB] ADMINISTRATIVE JUDGE LEE, (quoted from lines 9, and 13 thru 14, of exhibit 11). Under Webster's New Collegiate Dictionary, Copyright © 1975, "discipline" means "punishment".

In the instant case, Agustin's constitutional claims, including **CLAIM 9** and **CLAIM 10**, are not "'standing alone'" and there are "underlying statutory or regulatory right[s] to recovery" which "support the Court of Federal Claims' jurisdiction under the Tucker Act" and under the Back Pay Act (Hamlet v. U.S., 63 F.3d 1097, 1107 (Fed. Cir. 1995))—the Navy's 4-12-95 violation of Agustin's statutory and regulatory rights under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995]. Agustin has timely and "properly pleaded" such violation of his statutory and regulatory rights, and such violation "are both justiciable and remediable in this court". Roth v. United States, CFC No. 00-638C (4-15-03), (or "Roth"). In Roth, as in the instant case, Agustin has timely filed and "has properly pleaded statutory and regulatory violations by the" Navy [--the Navy's 4-12-95 violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995)--] "that are both justiciable and remediable in this court" (Roth, at page 1) pursuant to: the Tucker Act; the Back Pay Act; and our U.S. Supreme Court's governing law or "clearly established precedents" (Packer, 123 S.Ct., at 365) in United States v. Testan, 424 U.S. 392, 405 (1976), United States v. Hopkins, 427 U.S. 123, 128 (1976), and in United States v. White Mountain Apache Tribe, U.S. No. 01-1067 (3-4-03) (or "White Mountain")[9] (pages 5-6, and 11, of slip opinion).

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[9] See White Mountain slip opinion at U.S. Supreme Court's internet web site, or: http://www.supremecourtus.gov/opinions/02pdf/01-1067.pdf

65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), (which the Navy ***had all disobeyed***

"'[F]ederal agencies **must obey all federal laws**, not just those they administer'... 254 F. 3d 130, 133 (2001)." FCC v. Next Wave Personal Communications Inc., U.S. No. 01-653 (1-27-03), (or "Next Wave"), at pg. 5-6 of slip opinion, (bold and underline added).[10]

To date, Defendant, very noticeably, has not presented "any law, rule, or regulation" (5 USC Section 7701(a)) that gives the Board jurisdiction over [] Agustin's claim of the Navy's 4-12-95 unjustified or unwarranted violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995). There is "no law, rule, or regulation that gives the Board [the Merit Systems Protection Board (MSPB)]

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and violated through its 4-12-95 "wrongful [or unlawful]" (Testan, 424 U.S., at 405)) "unjustified or unwarranted personnel action" against Agustin), are all money-mandating "applicable law[s]...[or] regulation[s]" (5 USC 5596(b)(1)) within the meaning of the Back Pay Act, and any one or all of these money-mandating authorities "create[] a substantive right enforceable against the Government by a claim for money damages", or at the very least, "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' 463 U.S. at 217 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976) (internal quotation marks omitted)". White Mountain, slip opinion, at page 5.

[10] See our U.S. Supreme Court's recent reannouncement of its governing, federal agency action in violation of "any law"-such action must be set aside-case law in FCC v. Next Wave Personal Communications Inc., U.S. No. 01-653 (1-27-03), (or "Next Wave"). See Next Wave slip opinion at U.S. Supreme Court's internet web site, or: http://www.supremecourtus.gov/opinions/02pdf/01-653.pdf

"In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 413-414 (1971), (underline added), which was quoted at Next Wave, at pg. 6 of slip opinion.

jurisdiction over [Agustin's] claim for violation of [65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995)]". Worthington v. U.S., 168 F.3d 24, 27 (Fed. Cir. 1999), (underline added).

In the instant case, it is now crystal clear and quite "beyond doubt that the plaintiff" has proven "set of facts in support of his claim[s] which would entitle him to relief". See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

With respect to relief, pursuant to our U.S. Supreme Court's recent reannouncement last term of its First Amendment's constitutional right "to petition"-case law and our U.S. Constitution's First Amendment's guarantee of constitutional right "to petition the government for a redress of grievances", Agustin respectfully requests and petitions this honorable Court to apply and enforce the plain, clear, unambiguous, and unequivocally expressed language and mandate of USC Section 5596(b)(1)(A)(i) and (b)(2) in the instant case. See BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002).[11] [page 10] **UNQUOTE**.

QUOTED FROM Agustin's 05/06/2003 Motion to amend to include CLAIM 9 and CLAIM 10, (based on quite recent U.S. Supreme Court's case law development), which was filed on 05/06/2003, Docket Entry No. 66.

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[11] "We have also considered the right to petition when interpreting federal law...We thus made explicit that 'the right to petition extends to all departments of the Government,' and that '[t]he right of access to the courts is...but one aspect of the right to petition.' [404 U.S.] at 510." BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002), (citation omitted).

EXCERPTS FROM AGUSTIN'S 08/25/2003 ADAMS MOTION (DOCKET ENTRY NO. 84) BASED ON QUITE RECENT DEVELOPMENT—THE U.S. COURT OF FEDERAL CLAIMS' ANNOUNCEMENT OR REANNOUNCEMENT OF ITS COLLATERAL ESTOPPEL, OR ISSUE PRECLUSION, OR RES JUDICATA-CASE LAW IN ADAMS V. THE UNITED STATES, CFC NO. 00-447C (AUGUST 11, 2003), A CASE LAW WHICH IS QUITE CONTROLLING WITH RESPECT TO OUR DISTRICT COURTS' LACK OF JURISDICTION OVER AGUSTIN'S CLAIMS:

QUOTE:

[Page 1] **PLAINTIFF'S EX PARTE MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF THIS COURT'S MOST RECENT COLLATERAL ESTOPPEL, OR ISSUE PRECLUSION, OR RES JUDICATA-CASE LAW IN ADAMS V. THE UNITED STATES, CFC NO. 00-447C (AUGUST 11, 2003)**

Pursuant to this Court's Rule 7(b), and Federal Rules of Civil Procedure 15(d), Plaintiff (or "Agustin") very respectfully requests or moves this honorable Court to take judicial notice of this Court's most recent collateral estoppel, or issue preclusion, or res judicata-case law in Adams v. The United States, CFC No. 00-447C (August 11, 2003) (or "Adams v. The United States")[1], note 9, at pages 7-8 of opinion.

This Court's most recent collateral estoppel, or issue preclusion, or res judicata-case law (in Adams v. The United

[1] See the Adams v. The United States opinion in the Internet at: http://www.uscfc.uscourts.gov/Opinions/Block/03/BLOCK.Adams.pdf

States, CFC No. 00-447C (August 11, 2003) (or "Adams v. The United States"), note 9, at pages 7-8 of opinion)) is another quite relevant and quite controlling authority in the instant case.[2]

DISCUSSION

Agustin's claims before this honorable Court, among others, are: (1) the unconstitutional taking of his property, rights, or interests without just compensation, a claim which is above $10,000; and (2) his Tucker Act-Back Pay Act claim, another claim which is also above $10, 000.00 dollars, (for the period from April 21, 1995 to the present), based on the Navy's violation of his statutory and regulatory rights under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995). Both timely filed and properly pleaded claims are **not** covered under the Civil Service Reform Act (CSRA).

In the instant case, based on Federal Rule of Civil Procedure (FRCP) Rule 41(b), Costelo, Semtek, Tindle, and Keene, there is **no** final judgment or adjudication upon the merits of Agustin's (1) unconstitutional taking without just

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[2] "Defendant also asserts that this case is barred under the doctrine of collateral estoppel, or issue preclusion, since the issues presented were decided by the D.C. Circuit in the preceding litigation. This Court rejects that argument, however, under a well established exception to collateral estoppel that blocks the doctrine's applicability where the party against whom preclusion is sought could not, as a matter of law, have raised the issue in the prior litigation. Since this Court has exclusive jurisdiction over takings claims above $10,000, neither the D.C. District Court nor the D.C. Circuit would have jurisdiction over plaintiff's claims. As a result, plaintiffs could not, as a matter of law, have raised their takings claims under the prior litigation." Adams v. The United States, note 9, at pages 7-8 of opinion.

compensation claim and (2) his claim of the Navy's violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995). Both claims have never been before any other court, both claims are timely filed and have been properly pleaded before this Court, and this Court has jurisdiction over both claims.[3]

There is **no** "law, rule, or regulation" which grants the Merit Systems Protection Board (or "MSPB" or "Board") jurisdiction over such violations—(1) the unconstitutional taking of Agustin's property, rights, or interests without just compensation; and (2) the Navy's violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995); and it is quite crystal clear that the Civil Service Reform Act (CSRA) does **not** apply over both violations. 5 USC Section 7701(a). There is "no law, rule, or regulation that gives the Board jurisdiction over [Agustin's] claim for violation of [65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995)]". Worthington v. U.S., 168 F.3d 24, 27 (Fed. Cir. 1999), (underline added).

Agustin has timely filed and has "properly pleaded statutory and regulatory violations by the" Defendant (or the "Navy") "that are both justiciable and remediable in this

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[3] See Costelo (Costelo v. United States, 365 U.S. 265, 285-286 (1961)), Semtek (Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001)), Tindle (Tindle v. United States, U.S. Court of Federal Claims No. 01-231C (April 30, 2003), (or "Tindle"), (page 11 of opinion)), and Keene (Keene Corp. v. United States, 508 U.S. 200, 208, 210 (1993).

court" (Roth)[4] pursuant to the Tucker Act, the Back Pay Act, 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), and our U.S. Supreme Court's governing, Back Pay Act-case law or "clearly established precedents" (Packer, 123 S.Ct., at 365) in United States v. Testan, 424 U.S. 392, 405 (1976) (or "Testan"), United States v. Hopkins, 427 U.S. 123, 128 (1976) (or "Hopkins"), and in United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132 (2003) (or "White Mountain").

The Tucker Act (28 USC Section 1491) contains an unequivocally expressed waiver of sovereign immunity for claims against the government which are over $10,000.

The Back Pay Act (5 USC 5596) is an "Act of Congress" under the Tucker Act. 28 USC Section 1491.

65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), (which the Navy **had all disobeyed** and violated by its 4-12-95 "wrongful [or unlawful]" (Testan, 424 U.S., at 405)) "unjustified or unwarranted personnel action" against Agustin), are all money-mandating "applicable law[s]…[or] regulation[s]" (5 USC 5596(b)(1)) within the meaning of the Back Pay Act. Any one, or all, of these money-mandating authorities "create[] a substantive right enforceable against the Government by a claim for money damages", or at the

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[4] Roth v. United States, CFC No. 00-638C (4-15-03), (or "Roth"), (page 1 of opinion). See the Roth opinion in the Internet at: http://www.uscfc.uscourts.gov/Opinions/Gibson/03/GIBSON.rothxmsj.pdf

very least, "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' 463 U.S. at 217 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976) (internal quotation marks omitted)". White Mountain, at 1132.

Finally, pursuant to 28 USC Section 2501, Agustin's June 6, 2000 Complaint before this Court concerning his properly pleaded, (1) unconstitutional taking without just compensation claim and (2) his Tucker Act-Back Pay Act claim, which are each over $10,000, was timely filed.

At the time of Agustin's disciplinary removal on April 21, 1995, Agustin has statutory or regulatory rights or entitlement to receive sick leave pay or benefits under any one, or all, of the said money-mandating statutes and federal regulations, which the Navy has very quite clearly violated, and in so doing, the Navy had also violated Agustin's constitutional right to protection from the unconstitutional taking of his property, rights, or interests without just compensation.

Based on the undisputed and indisputable facts and evidence in the instant case (exhibits 62, 6, 14, and 13), the Navy's legal, statutory and regulatory duties and obligations under all the said money-mandating statutes and federal regulations **had been triggered**, the Navy failed or refused to obey such money-mandating statutes and federal regulations, and failed or refused to confer Agustin's pay, rights, and benefits. See exhibits 62, 6, 14, and 13.

The Navy's 4-12-95 unjustified or unwarranted personnel action, (which became effective on 4-21-95), refused or "**fail[ed] to...confer...[Agustin's pay, rights,**

and] benefit[s]" (5 CFR Section 550.803 (bold and underline added)), **had disobeyed and violated** 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), **had violated** Agustin's rights pursuant to these authorities, and in so doing, **had also violated** his constitutional rights as he has presented in his filings throughout this Court's proceedings.[5] See 5 CFR Section 630.401(a)(1), (2), (bold added). In Agustin's case, there is no question at all that the Navy's 4-12-95 "action[] include[s] personnel action[] and pay action[] (…in combination)." 5 CFR Section 550.803 (1-1-03), (underline added). "**Congress, of course, now has provided…in the Back Pay Act for the award of money damages for a wrongful deprivation of pay**". (Testan, 424 U.S., at 406, (bold and underline added)).

However, throughout this Court's proceedings, Defendant has repeatedly argued that Agustin's claims are "barred under the doctrine of collateral estoppel, or issue preclusion, [or res judicata] since the issues presented were decided by the [U. S. District Court for Northern California] in the preceding litigation". See Adams v. The United States, id.[6]

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[5] The Navy's 4-12-95 "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)) **had also violated** Agustin's fundamental and substantive Due Process rights or liberty interests to medical care or treatment, to enjoy or exercise his statutory and regulatory rights, and to continuous federal employment without violation of his statutory and regulatory rights; and his constitutional rights to equal protection of the laws, and to protection from the unconstitutional taking of his property, rights, or interests without just compensation.

[6] Defendant's argument is totally and completely without merit and was wrongfully based on Agustin's distinct and different, Rehabilitation Act/Title VII claim before the U.S. District Court for

First, "[t]his Court [must] reject[] that argument...under a well established exception to collateral estoppel that blocks the doctrine's applicability where the party against whom preclusion is sought could not, as a matter of law, have raised the issue in the prior litigation. Since this Court has exclusive jurisdiction over takings claims above $10,000, neither the [U.S. Court for the Northern California] nor the [Ninth] Circuit would have jurisdiction over [Agustin's] claims. As a result, [Agustin] could not, as a matter of law, have raised [his] takings claims under the prior litigation." See Adams v. The United States, note 9, at pages 7-8 of opinion. Compare 28 USC Sections 1346(a)(2) and 1491(a) with respect to this Court's exclusive jurisdiction for claims against the government over $10,000.

Second, there is another important and significant reason why "[t]his Court [must] reject[] that argument", Id. "Since this Court has exclusive jurisdiction over [Tucker Act] claims above $10,000, neither the [District Court] nor the [Ninth] Circuit would have jurisdiction over [Agustin's] claims. As a result, [Agustin] could not, as a matter of law, have raised [his] [Tucker Act] claims under the prior litigation." See, id., Adams v. The United States, note 9, at pages 7-8 of opinion.

Third, there is another equally important and significant reason why "[t]his Court [must] reject[] that

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Northern California (or "District Court"), which has been finally and completely litigated. Agustin's distinct and different claims before this honorable Court, among others, are: (1) his unconstitutional taking without just compensation claim above $10,000; and (2) his Tucker Act-Back Pay Act claim "above $10,000" (Adams v. The United States, id.) based on the Navy's violation of his statutory and regulatory rights under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), which is **not** covered under the CSRA.

argument". Id. Since the Navy's violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995) is **not** covered under the CSRA, the Board and the district courts lack jurisdiction over such Tucker Act-Back Pay Act claim. "Since this Court has exclusive jurisdiction over [Tucker Act-Back Pay Act] claims above $10,000 [and which are not covered under the CSRA], neither the [District Court] nor the [Ninth] Circuit would have jurisdiction over [Agustin's] claims. As a result, [Agustin] could not, as a matter of law, have raised [his] [Tucker Act-Back Pay Act] claims under the prior litigation." See, id., Adams v. The United States, note 9, at pages 7-8 of opinion.

This most recent collateral estoppel, or issue preclusion, or res judicata-case law in Adams v. The United States is another quite relevant and quite controlling authority in the instant case which requires and compels a decision in favor of Agustin's (1) unconstitutional taking without just compensation claim and (2) his Tucker Act-Back Pay Act claim, which are each "above $10,000" (id.) and which are both **not** covered under the CSRA. It is beyond any doubt that this most recent development--the Adams v. The United States collateral estoppel, or issue preclusion, or res judicata-case law—does absolutely affect the outcome of Agustin's unconstitutional taking without just compensation claim and his Tucker Act-Back Pay Act claim. [Page 8] **UNQUOTE**.

QUOTED FROM page 1-8 of Agustin's 08/25/2003 Adams Motion, which was served on 8-21-03, and which was filed on 08/25/2003, Docket Entry No. 84.

MOST RELEVANT EXCERPTS FROM CLAIMS COURT'S CIVIL DOCKET

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from the Claims Court's Civil Docket entries:

Filing Date	#	Docket Text
07/26/2001	18	NOTICE of the District Court's 5/23/01 Order resolving the jurisdiction issue concerning Plaintiff's claims by REMIGIO I. AGUSTIN. Filed by leave of the Judge. Service: 7/23/01. (LTD) (Entered: 07/26/2001).
07/26/2001	19	ORDER directing Clerk's Office to file Plaintiff's Notice of the District Court's Decision resolving the Jurisdiction issue concerning Plaintiff's claims and Defendant may respond to the notice by 8/17/01 (signed by Sr. Judge James F. Merow). Copy to parties. (LTD) (Entered: 07/26/01).
07/26/2001	20	NOTICE of the District Court's decision resolving the jurisdiction issue concerning Plaintiff's Claims under FECA by REMIGIO I. AGUSTIN. Filed by leave of the

		Judge. Service: 07/20/01. (LTD) (Entered: 07/26/2001).
07/31/2001	21	MOTION by REMIGIO I. AGUSTIN (Service: 7/27/01) to Amend [4-1] amended complaint. Response due: 8/13/01. (LTD) (Entered: 08/01/2001)
08/31/2001	27	MOTION by REMIGIO I. AGUSTIN (Service: 8/30/01) for Leave to amend his complaint, etc. Response due: 9/17/01 (HW) (Entered: 09/04/2001)
10/11/2001	34	REPLY by REMIGIO I. AGUSTIN to response to [27-1] motion for Leave to amend his complaint, etc. File by leave of the Judge. Service: 10/9/01. (LTD) (Entered: 10/12/2001). [The District Court's 6/8/01 Order, (App. E-69 to E-72), were attached to this reply.]
05/06/2003	66	MOTION to Amend Pleadings – Rule 15(b) [1] Complaint by REMIGIO I. AGUSTIN. Service: 4/29/03. Response due by 5/16/2003. (dwl,) (Entered: 05/12/2003)

[1. Q: Have you ever had another case in this Court? If so, state the name and the number of each case. A: No

2. Q: Did the trial court incorrectly decide or fail to take into account any facts? If so, what facts?]

CONTINUATION OF INFORMAL BRIEF:

2. In the instant case, **the U.S. Court of Federal Claims (or "Claims Court") had incorrectly decided or failed to take into account the following facts**: (a) that ***on 2-16-95, the Defendant's (or Navy's) statutory and regulatory, as well as its constitutional, duties and obligations pursuant to our money-mandating statutes and regulations–65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) (1-1-03) and 20 CFR Section 10.310(a) (1995) and pursuant to our U.S. Constitution had been triggered***[1] by Agustin's 2-16-95 application for "sick leave due to [his Federal Employees' Compensation Act (FECA) approved (see App. E-60 to E-61)] occupational injury" (App. E-62)—

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[1] QUOTE: Like under the Family and Medical Leave Act (FMLA), under the Sick Leave Act, "[t]o trigger employer's [Sick Leave Act duties and] obligations, employees need not explicitly assert their rights under the Act; they must only inform their employers of their reasons for seeking leave". See Ragsdale v. Wolverine, 122 S.Ct. 1155, 1166 (2002) (Justice O'Connor, with whom Justice Souter, Justice Ginsburg, and Justice Breyer join, dissenting), and see, accord, 5 CFR Sections 630.401, 402, and 403. UNQUOTE. App. K-[5]. Our federal and postal employees are not inferior or second class citizens, and like our private sector employees, under our U.S. Constitution, they have the same fair and equal, Due Process rights or liberty interests to enjoy or exercise their statutory and regulatory rights, and the same fair and equal, Equal Protection constitutional right.

is request to enjoy (1) his fundamental and substantive Due Process rights or liberty interests to exercise his statutory and regulatory "'right[s] to…use'" (Philips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998); see his "statutory right to 'use'" sick leave-claim at page 15 of Complaint) his accumulated annual leave and his accumulated sick leave as sick leave benefits or entitlement, and (2) his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment, (see App. D-2)[2]; (b) that ***on 2-28-95, the Navy "approved" Agustin's application for sick leave benefits or entitlement until his annual leave and sick leave accounts***—his private property for the purposes of our U.S. Constitution's Takings Clause--***"become[] exhausted"*** (App. E-6); (c) that ***from 1-23-95 to 4-21-95 (the effective date of the Navy's 4-12-95 disciplinary removal personnel action), Agustin was receiving sick leave benefits or entitlement*** (see App. E-13), that Agustin's "entitlement to [sick leave] benefits had been established" (American Mfrs. Mut. Ins. Co. v. Sullivan, 119 S.Ct. 977, 990 (1999)), and that "the interest of [Agustin] in continued receipt of these [sick leave] benefits is a statutorily created property' protected by the Fifth Amendment"

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[2] "[Page 1] This honorable Court has jurisdiction pertaining to his claims for back pay and the unconstitutional taking of his accumulated sick leave **pursuant to the Tucker Act (28 USC Section 1491(a)(1)), the Back Pay Act (5 USC Section 5596)**…[page 3] 5 USC Section 8118(c) and/or 65 Statute 681, Section 204(b) was an 'applicable law' within the meaning of the Back Pay Act and the very clearly erroneous deprivation or obliteration of his constitutionally protected, statutory rights pursuant to either or both of these statutes—to 'use' his accumulated leave due to his occupational injury or condition—was an 'unjustified or unwarranted personnel action' which entitled him to an award for lost pay and benefits since April 21 1995". 06/13/2000, #3, at App. [AA-12]--"Complainant's Additional Pleading…" at pages 1 and 3, (bold and underline added).

(Mathews v. Eldridge, 397 U.S. 319, 332 (1976) (citation omitted)); (d) that ***on 4-21-95, Agustin has unused and remaining "444.80" hours of accumulated annual leave and "252.90" hours of accumulated sick leave*** (see App. E-13), which he has statutory and regulatory "'right[s] to…use'" (Philipps, 524 U.S., at 170) as sick leave benefits or entitlement "due to [his FECA approved] occupational injury" (App. E-62) pursuant to all the said money-mandating authorities and constitutional right to use pursuant to his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment; (e) that ***on and after 4-21-95, Agustin has a great and urgent need to "receive[]…medical…treatment…[wa]s incapacitated for the performance of duties by physical or mental…injury"*** (5 CFR Section 630.401(a)(1), (2) (1-1-03)) (see App. E-14) and that based on his physician's 3/6/95 medical report (App. E-14), ***his incapacitation for work would continue for 90 days or longer, or at least up to about 6/6/95***, (see App. D-[4 to 6]); (f) that the Navy's infringement or violation of his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment—the Navy's 4-12-95 personnel action—had aggravated his medical injuries or conditions (see App. E-32); (g) that ***from 12-15-93 to 4-21-95 Agustin enjoyed his fundamental and substantive Due Process rights or liberty interests by his exercised of his statutory and regulatory rights***--his FECA continuation of pay rights from 12-15-93 to 1-31-94, his FECA compensation rights from 2-1-94 to 1-22-95, and his 65 Statute 681, Section 204 rights from 1-23-95 to 4-21-95--that ***all such absence or "unavailability for duty" (App. E-4) was all approved or authorized absence and was all with the blessing of the federal government*** (see App. D-1 [to 2]), and that such "unavailability for duty" (App. E-4)—such enjoyment of his

fundamental and substantive Due Process rights or liberty interests by his exercised of his statutory and regulatory rights pursuant to our money-mandating statutes and regulations was "constitutionally protected conduct" (Arnett v. Kennedy, 416 U.S. 134, 163 (1974)); (h) ***that the cause for the Navy's 4-12-95 personnel action*** was Agustin's "unavailability for duty" (App. E-4) or Agustin's enjoyment of his fundamental and substantive Due Process rights or liberty interests by his exercised of his statutory and regulatory rights under FECA and under our leave with pay statutes, and ***was not due to any misconduct; nor any violation of, or failure to follow, any law, rule, regulation, or policy; nor any use of alcohol or illegal drugs; nor any unapproved absence or absence without leave (AWOL) by Agustin***; (i) that ***on 5-23-01 and on 6-8-01, the District Court issued its lack of jurisdiction rulings***[3] ***over Agustin's***

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[3] The District Court ruled that Agustin "never asserted" a "claim of the Navy's unconstitutional taking of his sick leave". Footnote 2, at App. E-27/page 5 of District Court's 5-23-01 Order. "Plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA…The Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims." App. E-[30]/District Court's 5-23-01 Order, at page 9. App. E-23 to E-31 were attached to Agustin's 07/26/2001 "Notice of the District Court's decision resolving the jurisdiction issue…", which was **filed by leave of the Judge** on 07/26/2001, #18, at App. [AA-1 or C-13].

"The Claim Pursuant to 5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2) Plaintiff also requests that the Court alter its judgment with respect to his claim that the Navy's denial of paid sick leave violated the above-cited laws. The Court has reviewed plaintiff's Complaint in this case, and finds that plaintiff never alleged a cause of action under these statutes and regulations. See Complaint of December 18, 1996." App. E-71/District Court's 6-8-01 Order, at page 3. See 10/11/2001, #34, at App. [C-15], which was **filed by leave of the Judge**.

takings claim and Tucker Act-Back Pay Act claim, that such rulings have *res judicata* (issue preclusion) effect over the issue of the Claims Court's jurisdiction, and that 28 USC Section 1500 does not apply here, (see App. E-23 to E-31, and App. E-69 to E-72; and App. [D-11 to 13]; (j) that ***on 6-6-00 (at the time of filing of Agustin's 6-6-00 Complaint in the Claims Court), there was no final judgment on the merits of Agustin's takings claim and Tucker Act-Back Pay Act claim***, and that our governing Federal Rules of Civil Procedure (FRAP) Rule 41(b)-case law in Costelo v. United States, 365 U.S. 265, 285-286 (1961), (or 'Costelo') and in Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek') is quite controlling with respect to this Rule 41(b) issue, (see App. P-1) ; and (k) ***that Agustin's takings claim (CLAIM 6, which includes the amounts in CLAIMS 1 and 2) and his Tucker Act-Back Pay Act claim (CLAIM 4) are each above $10,000***, and that Agustin could not, as a matter of law, have raised his takings claims and his Tucker Act-Back Pay Act claim under the prior, District Court litigation, (see Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), and App. R-[7]; also see App. G-1 to G-[4]—Agustin's ten (10) CLAIMS).

Based on all the ***foregoing undisputed and indisputable facts***, it is now quite crystal clear and quite "beyond doubt that the plaintiff [Agustin]" has proven "set of facts in support of his claim[s] which would entitle him to relief". See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[3. Did the trial court apply the wrong law? If so, what law should be applied?]

3. With respect to Agustin's takings claim (CLAIM 6, which includes the amounts in CLAIMS 1 and 2) and his back pay

claim (CLAIM 4), the Claims Court applied the wrong law: "*United States v. Fausto*, 484 U.S. 439 (1987)" and "5 USC Sections 7511-7514, 7703" (App. B-5). The Claims Court's rubber-stamp and boiler-plate approval of administrative and judicial decisions, which do not apply in Agustin's Tucker Act and Back Pay Act claims, was also an application of the wrong law, and has deprived Agustin of a fair and full hearing. (It should have analyzed the merits of Agustin's claims, among others, the interpretation, relevance, and applicability of the Tucker Act and the Back Pay Act and whether the Back Pay Act and the Civil Service Reform Act (CSRA) "are capable of co-existence" (Morton v. Mancari, 417 U.S. 535, 551 (1974)).

The Claims Court should have applied: with respect to Agustin's takings claim (CLAIM 6, which includes the amounts in CLAIMS 1 and 2)—the Tucker Act and Brown v. Legal Foundation of Washington, 123 S.Ct. 1406 (2003), (or "Brown"); and with respect to his back pay claim (CLAIM 4)—the Tucker Act and the Back Pay Act, our U.S. Supreme Court's Back Pay Act-case law in United States v. Testan, 424 U.S. 392, 405-406 (1976) (or "Testan")] and in United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132 (2003) (or "White Mountain"), its "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974), and Worthington v. U.S., 168 F.3d 24, 27 (Fed. Cir. 1999). The Claims Court dismissed Agustin's Complaint, in violation of his Due Process rights, **without** affording Agustin a fair and full hearing on the merits of his claims, among others, the interpretation, relevance, and applicability of the Tucker Act and/or the Back Pay Act to each one of his claims.

[4. Did the trial court failed to consider important grounds for relief? If so, what grounds?]

4. **For important grounds for relief, the Claims Court failed to consider**: (a) for CLAIMS 3 and 5 (*a quite distinct and different claim*)—26 USC Section 104(a)(1) and 28 USC Section 1346(a)(1) or 28 USC Section 1491(a); and (b) for CLAIMS 7 thru 10—our controlling U.S. Constitution's provisions, the Tucker Act, and the "underlying statutory or regulatory right[s] to recovery" which "support the Court of Federal Claims' jurisdiction under the Tucker Act"—**the Navy's 4-12-95 violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) (1-1-03) and 20 CFR Section 10.310(a) (1995)** and of Agustin's pay, rights, or benefits pursuant to these money-mandating authorities. Hamlet v. U.S., 63 F.3d 1097, 1107 (Fed. Cir. 1995). See App. G-1 to G-[4] for Agustin's ten claims.

The Claims Court deprived Agustin of his Due Process rights to be heard and to a fair and full hearing by not even mentioning or discussing CLAIMS 3, 5, and 7 to 10.

[5. Are there other reasons why the trial court's decision was wrong? If so, what reasons?]

5. Yes. See the following for the other reasons why the Claims Court's 9-5-03 Order was wrong:

DISCUSSION

The instant case has momentous, exceptional, and national importance and significance, which affect the pay, rights, and/or benefits of **all our poor federal and U.S. Post Office employees** (or "postal employees"), and which this honorable Court has a moral, humanitarian, and judicial duty to address. For much too long, our federal courts' "misinterpretation of", or unwillingness to apply and enforce, "our [U.S. Supreme Court's Back Pay Act-case law or] decision in Testan [United States v. Testan, 424 U.S. 392, 405-406 (1976) (or "Testan")] does continuing damage" and travesty or miscarriage of justice against all our poor federal and postal employees, which affects "large class of cases" involving federal and postal employers' violations of our money-mandating statutes and regulations or such employers' "wrongful deprivation of pay" (Testan, at 406) against federal or postal employees, such as what had happened in Agustin's case.[4] See Hambsch v. U.S., 490 U.S. 1054, 1058 (1989). **For much too long, with respect to their rights under the Back Pay Act, all our poor federal and postal employees have been, and are being, treated like inferior or second class citizens by our federal courts.**

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[4] In a quite clear error of law, in the instant case, the Claims Court misapplied "*United States v. Fausto*, 484 U.S. 439 (1987)" (App. B-5) with its meaningless and useless, rubber-stamp and boiler-plate approval of administrative and judicial decisions, which do **not** apply in Agustin's Tucker Act and/or Back Pay Act claims, instead of correctly applying, the quite controlling, Testan-Back Pay Act-case law and our "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974). Also see our federal court's blind search for waiver/s of sovereign immunity in Hambsch (857 F.2d 763), Mann (120 F.3d 34 (1997)), and Russell (191 F.3d 1016 (9th Cir. 1999)), which are in violation of, or contrary to, our U.S. Supreme Court's governing, Back Pay Act-case law in Testan, 424 U.S. 392, 405-6 (1976).

This ongoing damage and injustice should be stopped by this honorable Court.

JURISDICTION

This Court has jurisdiction pursuant to 28 USC Section 1295(a)(3). On 09/05/2003, (#85, App. [C-20]), the U.S. Court of Federal Claim (or "Claims Court") issued its dismissal Order (App. B-1 to B-[8]). On 09/08/2003, (#86, App. [C-20]), the Claims Court's issued its Judgment (App. B-9). On 09/30/2003, (#87, App. [C-20]), Agustin timely filed his appeal [].

STATEMENT OF THE CASE

For more detailed, "HISTORICAL BACKGROUND AND SET OF FACTS", see Appendix (or "App.") D-1 to D-[21].

Agustin's "claim for back pay is based upon" **the Navy's 4-12-95 violation of all the said money-mandating federal statutes and federal regulations** which is justiciable and remediable in the Claims Court pursuant to the Tucker Act and the Back Pay Act, **not** pursuant to the CSRA or Title VII. Read v. United States, 254 F3d 1064, 1067 (Fed. Cir. 2001).

Agustin "alleges that" he "was the victim of" (Davis v. Monroe County Board of Education, 526 U.S. 629, 653 (1999)) **the Navy's violation of our money-mandating statutes and regulations**, that such violation violated his statutory, regulatory, and constitutional rights, and that such

violation is justiciable and remediable in the Claims Court pursuant to the Tucker Act and the Back Pay Act.[5] Agustin alleges that as applied to the facts in the instant case, among other claims: the Navy, through its 4-12-95 personnel action (App. E-7 to E-8), had ***unlawfully*** deprived (CLAIM 4), and had ***unconstitutionally*** took away (CLAIM 6), Agustin's statutory and regulatory "'right[s] to…use'" (Philipps, 524 U.S., at 170) his accumulated annual leave and his accumulated sick leave as sick leave benefits or entitlement "due to [his FECA approved] occupational injury" (App. E-62) **in violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) (1-1-03)[6] and 20 CFR**

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[5] Agustin's "complaint detailed the events leading to his termination, [that the Navy "***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA" (Complaint, at 13) "its unlawful and/or unconstitutional deprivation forever of disabled federal employees' constitutionally protected, statutory right to 'use' their accumulated sick leave" (Complaint, at 15)], provided relevant dates, and included [clear and convincing exhibits or evidence]…These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley, supra,* [355 U.S.] at 47. In addition, they state claims upon which relief could be granted under" the Tucker Act and the Back Pay Act. See Swierkiewicz, 122 S.Ct., at 999.

[6] The plain, clear, and unambiguous, clear statutory language and mandate of the Sick Leave Act or 65 Statute 681, Section 204, the Statute from which 5 USC Section 6307 was codified, unequivocally expressed that: "(a) Officers and employees to whom this title applies **shall be entitled to sick leave with pay**…(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, **shall accumulate and be available for use** in succeeding years." 65 Statute 681, Section 204(a), (b), (bold and underline added). See United States v. Monsanto, 491 U.S. 600, 607 (1989); Anderson v. Yungkau, 329 U.S. 482, 485 (1947); see also Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (per curiam); Association of Civilian Technicians v. FLRA, 22 F.3d 1150,

Section 10.310(a) (1995). That **such personnel action was also unconstitutional**: because it had deprived Agustin's fundamental and substantive Due Process rights or liberty interests to enjoy or exercise his statutory and regulatory rights pursuant to the said money-mandating authorities (CLAIM 9); because it had violated Agustin's fundamental and substantive Due Process rights or liberty interests in *the enjoyment or exercised of his statutory and regulatory rights pursuant to the said money-mandating authorities—his constitutionally protected conduct*--**without** any punishment or disciplinary action (CLAIM 10); because it had infringed or violated Agustin's fundamental and substantive Due Process right or liberty interest to medical care or treatment (CLAIM 7); and because it had violated his constitutional right to equal protection of the laws (CLAIM 8). Agustin has properly pleaded that the Claims Court has jurisdiction over all such claims pursuant to the Tucker Act and/or the Back Pay Act.

1153 (CADC 1994) ("The word `shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory"). Most dispositive is 5 CFR Section 630.401(a), which gives federal or postal employers no discretion whatsoever to deprive or deny sick leave rights or benefits when an employee provides "administratively acceptable evidence" (5 CFR Section 630.403(a)) that he is incapacitated for work due to illness or injury, or receiving medical treatment, and it very clearly and very explicitly unequivocally commands in unmistakable and unambiguous mandatory language that: "[A]n agency **must grant sick leave** to an employee when the employee--(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth". 5 CFR Section 630.401(a)(1), (2), (bold and underline added).

The Claims Court deprived Agustin of his First Amendment constitutional right "to petition"[7] (see App. J-1) and his Due Process rights to be heard and to a fair and full hearing: (1) by applying the wrong law—"*United States v. Fausto*, 484 U.S. 439 (1987) [and] 5 USC Sections 7511-7514, 7703" (App. B-[6 to 7]); (2) by its rubber-stamp and boiler-plate approval of administrative and judicial decisions, which do **not** apply here, and which it did **not** have jurisdiction to review; and (3) by **not** fairly and fully hearing and adjudicating the merits, or the merits issues, of Agustin's claims—among others, the merit issue of the interpretation, relevance, and applicability of the Tucker Act and/or the Back Pay Act in Agustin's claims.

The Claims Court committed a quite crystal clear error of law in its 9-5-03 dismissal Order and had quite clearly violated Agustin's First and Fifth Amendment rights by not even mentioning nor analyzing (1) the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings, and (2) the Tucker Act and the Back Pay Act—the two statutes which Agustin has properly pleaded to establish the Claims Court's jurisdiction and upon which relief could be granted. The Claims Court's boiler-plate Order has **no "evaluation of the [relevant] facts" and no "analysis of the law" (Anderson,**

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[7] "We have also considered the right to petition when interpreting federal law…We thus made explicit that 'the right to petition extends to all departments of the Government,' and that '[t]he right of access to the courts is…but one aspect of the right to petition.' [404 U.S.] at 510." BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002). By **not** analyzing the law—the Tucker Act and the Back Pay Act, the Claims Court's 9-5-03 Order deprived or violated Agustin's Due Process rights to a fair and full hearing and his First Amendment constitutional right "to petition" that Court for the interpretation, relevance, and applicability of the Tucker Act and the Back Pay Act in the instant case. See App. J-1.

390 U.S., at 434)—no analysis of the *res judicata* (issue preclusion) effect of the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings and no analysis of the Tucker Act and the Back Pay Act nor any one of the money-mandating statutes and regulations—just a meaningless and useless, rubber-stamp and boiler-plate approval of administrative and judicial decisions which do not apply in Agustin's Tucker Act and/or Back Pay Act claims.[8] The Claims Court should not have dismissed Agustin's Complaint **without** affording him a fair and full hearing as to whether the Tucker Act and the Back Pay Act are relevant and/or controlling, or not, to each one of his claims.

APPEAL CLAIMS OR ISSUES

I. Whether, based on the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings, the U.S. Court of Federal Claims' (or "Claims Court") ruling that "28 USC Section 1500 bars the complaint filed...appears to be correct" (App. B-[6]) is in violation of, or is contrary to, (a) our U.S. Supreme Court's "time of filing rule"-case law in Keene Corp. v. United States, 508 U.S. 200, 207-208 (1993)[9] and its (b) *res judicata* (issue preclusion)-case law?

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[8] "It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." Protective Committee v. Anderson, 390 U.S. 414, 434 (1968).

[9] "'[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought'...subject matter jurisdiction turns on the facts upon filing"—"the time-of-filing rule". Keene Corp. v. United States, 508 U.S. 200, 207, 208 (1993), (citations omitted).

28 USC Section 1500 does **not** apply in the instant case based on the U.S. District Court for Northern California's (or District Court's) May 23, 2001 and June 8, 2001 **lack of jurisdiction** rulings over Agustin's (1) unconstitutional taking without just compensation claim (CLAIM 6, which includes the amounts in CLAIMS 1 and 2) and (2) his claim that the Navy violated his rights or benefits under 5 USC Section 6307 and/or under FECA (CLAIM 4). See App. E-27 (at footnote 2), E-[30], and E-71, which were part of the records before the Claims Court.

On 12-18-96, Agustin filed his Rehabilitation Act/Title VII Complaint before the District Court, *which involved distinctly different claims and distinctly different relief, including front pay and compensatory relief*, based on Agustin's claims pursuant to the Rehabilitation Act and Title VII, which the Claims Court has no jurisdiction. See App. D-[9].

On 8-8-99, the District Court granted summary judgment for the Navy and against Agustin with respect to all his Rehabilitation Act and Title VII claims.

On 6-6-00, (#1, at App. [C-12]), Agustin timely filed his Complaint in the Claims Court. Agustin timely filed and properly pleaded his justiciable and remediable claims that the Navy:

> [page 13] "***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA--at the time when he needed it most. (See 5 USC Section 8118(c): 'An employee may use annual or sick leave' for a job-related disability; and 20

> CFR 10.310(a): 'An employee who sustains a job-related disability may use sick or annual leave or both to avoid interruption of income')". 6-6-00, Complaint, at 13; see "statutory right to 'use'" sick leave-claim at 15.

Such "statutory rights under 5 USC Section 6307 and/or under FECA" (id.) includes Agustin's "'right to...use'" (Philipps, 524 U.S., at 170) his accumulated annual leave and his accumulated sick leave as sick leave benefits "due to [his FECA approved] occupational injury" (App. E-62)--rights which the Navy has (1) ***unlawfully*** deprived and (2) ***unconstitutionally*** took away from him through its 4-12-95 personnel action.

On 5-23-01 and on 6-8-01, the District Court made its lack of jurisdiction rulings over Agustin's claims. Based on the District Court's 5-23-01 and 6-8-01 **lack of jurisdiction rulings** (in App. E-27 (at footnote 2), E-[30], and E-71), the following facts are quite crystal clear and beyond any doubt, that: (1) Agustin has no claim "pending" in the district court, nor in any other court, "for or in respect" (28 USC Section 1500) to (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (App. E-27, at footnote 2) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA" (App. E-[30]) or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71); (2) that the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings over the said two claims operate as ***res judicata*** (issue preclusion) over the issue of jurisdiction; and (3) that there was **no final judgment on the merits** of the said two claims at the time of filing of Agustin's 6-6-00 Complaint in the Claims Court.

See Federal Rules of Civil Procedure (FRAP) 41(b) and App. P-1. The ***res judicata*** **effect** of the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings was repeatedly, properly pleaded by Agustin and was properly before the Claims Court. See 07/26, 2001, #18 and #19, at App. [AA-1 or C-13].

Finally, as Agustin has presented throughout the Claims Court's proceedings, our U.S. Constitution's Full Faith and Credit Clause requires the Claims Court to observe, respect, and apply the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings over Agustin's claim.[10]

Based on all the foregoing, the Claims Court's 28 USC Section 1500 jurisdiction ruling was a quite clear error of law and should be reversed by this Court.

II. Whether the U.S. Court of Federal Claims (or "Claims Court") ruling that "28 USC Section 1500 bars the complaint filed" (App. B-4) in the Claims Court is in violation of, or is contrary to, our U.S. Supreme Court's governing Federal Rules of Civil Procedure (FRCP)

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[10] "(4) [M]ost importantly, based on the District Court's quite clear and unequivocal jurisdiction rulings, "comparison" between the claims in the two Complaints is moot, or is not required or necessary, because there is no "comparable claim[]"--no *5 USC Section 6307 and/or FECA* claim--before the District Court to compare with (see Keene, at 210)... (6) our U.S. Constitution's "full faith and credit" provision applies in the instant case, and requires and mandates that this Court must apply, honor, and respect the District Court's [lack of] jurisdiction rulings for or in respect to Agustin's *5 USC Section 6307 and/or FECA* claim." Page 7 of Agustin's "REPLY TO: 'DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO SUBMIT NEW AUTHORITY [or White Mountain Motion]'". 03/31/2003, #53, at App. [C-17].

41(b)-case law in Costelo v. United States, 365 U.S. 265, 286 (1961), (or "Costelo") and in Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek')?

"[T]here is **no final judgment on the merits** of Agustin's claim of the Navy's 4-12-95 violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995) based on the District Court's 5-23-01 and 6-8-01 jurisdiction rulings (App. E-[30] and E-71) that it lack jurisdiction over such claim, and, therefore, [the Claims] Court has jurisdiction over such claim. Federal Rule of Civil Procedure (FRCP) 41(b) applies in the instant case, and our U.S. Supreme Court's FRCP 41(b)-case law in Costelo v. United States, 365 U.S. 265, 286 (1961), (or "Costelo") (see App. P-1), is the controlling authority with respect to FRCP 41(b) involving this Court's jurisdiction over such claim." Pages 3-4 of Agustin's "04/09/2003 Motion" or "MOTION FOR LEAVE TO FILE THIS SUPPLEMENTAL PLEADING IN RESPONSE TO: DEFENDANT'S "SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS". 04/09/2003, #58, at App. [C-17].[11] Also see App. P-1.

"[Page 4] Here, 'the government [or Defendant] was foreclosed in the Court of Federal Claims from collaterally

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[11] Please also kindly take judicial notice of Agustin's "05/06/2003 Reply" or "REPLY TO: 'DEFENDANT'S RESPONSE TO PLAINTIFF'S APRIL 7, 2003 MOTION FOR LEAVE TO FILE A RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS'". 05/06/2003, #65, at App. [C-18].

attacking the district court's authority to issue' its 5-23-01 and 6-8-01 lack of jurisdiction rulings in the exercise of its authority under Rule 41(b). International Air Response v. United States, CAFC No. 01-5117 (4-7-03), or ('Air Response'), at page 3.[12]...[page 6] our U.S. Supreme Court's Rule 41(b)-case law in Costelo v. United States, 365 U.S. 265, 285-286 (1961), (or 'Costelo'), is a controlling authority that this Court has jurisdiction over Agustin's claim of the Navy's 4-12-95 violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) (1-1-03) and 20 CFR Section 10.310(a) (1995). Also see accord: Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek') [see App. P-1]." Page 4 and 6 of Agustin's 05/06/3003 Reply, which was filed on 05/06/2003, #65, at App. [C-18]. See App. P-1.

Based on our U.S. Supreme Court's "governing" FRCP Rule 41(b)-case law (Kamen, 500 U.S. 90, 99 (1991)) in Costelo and in Semtek (see App. I-1), the Claims Court's 28 USC Section 1500 ruling was a quite clear error of law and should be reversed by this Court.[13]

III. Whether (a) the Claims Court's 9-5-03 Order is in violation of, or is contrary to, our U.S. Supreme Court's Tucker Act-"the Court of Federal Claims has exclusive jurisdiction over nontort claims against the Government

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[12] See the quite recent, Air Response opinion at the Internet, at http://www.fedcir.gov/opinions/01-5117o.doc

[13] "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991).

for greater than $10,000"-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999); and whether, (b) Agustin "could not, as a matter of law, have raised [his] takings claims [and his Tucker Act-Back Pay Act claim] under the prior litigation" (Adams v. The United States, CFC No. 00-447C (August 11, 2003), at footnote 9, page 8 of opinion, (bold and underline added)) because each one of these two claims is greater than $10,000?

In Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999), at footnotes 13 and 14, our U.S. Supreme Court, in a unanimous opinion, declared that:

> "[Footnote] 13: Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over nontort claims against the Government for greater than $10,000. See 28 U. S. C. §1491…
> [Footnote] 14: The "Little Tucker Act," 28 U. S. C. §1346(a)(2), confers jurisdiction on district courts for claims of $10,000 or less…", (underline added).

Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999).

"Since this Court [U.S. Court of Federal Claims] has exclusive jurisdiction over takings claims above $10,000, [and Tucker Act-Back Pay Act claims above $10,000 and which are not covered under the CSRA] neither the [U.S. District Court for Northern California] Court nor the [Ninth] Circuit would have jurisdiction over [Agustin's] claims. **As a result, [Agustin] could not, as a matter of law, have raised [his] takings claims [and his Tucker Act-Back Pay Act claim] under the prior litigation.**" See App. R-[7], or

Adams v. The United States, CFC No. 00-447C (August 11, 2003) (or "Adams v. The United States"), at footnote 9, page 8 of opinion, (bold and underline added).[14] See App. R-1 to R-[8].

This quite recent, Claims Court case law in Adams v. The United States is a quite relevant and quite controlling authority in the instant case with respect to the issue of the Claims Court's jurisdiction over Agustin's claims, and Agustin submits that the Claims Court's denial of his 08/25/2003 Adams Motion (#84, at App. [C-20]) was a quite clear error of law and should be reversed by this Court. See App. R-[7] especially, and also App. R-1 to R-[8].

IV. Whether (a) federal or postal employers' violations of our money-mandating statutes or regulations, such as 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Section 6303, 5 USC Section 8118(c), 5 CFR Section 630.401(a)(1), (2) (1-1-03), and/or 20 CFR Section 10.310(a) (1995), are justiciable and remediable in the Claims Court pursuant to the Tucker Act and the Back Pay Act; and whether (b) the Claims Court's 9-5-03 dismissal Order is in violation of, or is contrary to, Worthington v. U.S., 168 F.3d 24, 27 (Fed. Cir. 1999) and our U.S. Supreme Court's Back Pay Act-case law in

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[14] Agustin takings claims, (CLAIM 6, which includes the amounts in CLAIMS 1 and 2), is about **$25,581.15** ("**Claim 1**...**$19954.62**... [plus] **Claim 2**...**$5626.53**" (App. G-1) equals **$25,581.15**). Agustin's Tucker Act-Back Pay Act claim, "**Claim 4**: lost employment pay and benefits since April 21, 1995" (App. G-[2]), is **over $10,000**. See App. R-1 to R-[8].

See the Adams v. The United States opinion in the Internet at: http://www.uscfc.uscourts.gov/Opinions/Block/03/BLOCK.Adams.pdf

United States v. Testan, 424 U.S. 392, 405-406 (1976) (or "Testan") and in United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132 (2003) (or "White Mountain")?

The Claims Court's 9-5-03 dismissal Order was a quite crystal clear error of law, had violated Agustin's First Amendment constitutional right "to petition" the Claims Court for the interpretation, relevance, and applicability of **the Tucker Act and/or the Back Pay Act**, (see App J-1), had violated his Due Process rights to be heard and to a fair and full hearing on the merits of his claims, and should be reversed by this Court. The Claims Court unfairly focused on the wrong issues and used a one-sided and tunnel vision approach in adjudicating the instant case. With respect to Agustin's back pay claim (CLAIM 4), in violation of Agustin's First and Fifth Amendment constitutional rights, it did not even bother to mention nor discuss the most elementary and fundamental, ***key and threshold merits issues*** as to: (1) based on the Navy's 2-28-95 approval (see App. E-6) of Agustin's 2-16-95 application for sick leave benefits or entitlement "due to [his FECA approved] occupational injury" (App. E-62), whether Agustin has statutory and regulatory "'right[s] to…use'" (Philipps, 524 U.S., at 170) his "444.80" hours of accumulated annual leave and his "252.90" (App. E-13) hours of accumulated sick leave as sick leave benefits or entitlement pursuant to all the said money-mandating authorities and (2) whether violation of such rights is justiciable and remediable in the Claims Court **pursuant to the Tucker Act and the Back Pay Act**—statutes which Agustin has timely and properly pleaded to establish jurisdiction in the Claims Court and upon which relief could be granted.

Under the "property" component of the Fifth Amendment's Due Process Clause[15] and under the First Amendment's constitutional right "to petition" our federal courts (see App. J-1), Agustin has constitutional rights to be heard and to a fair and full hearing on the merits of his claims and to enjoy his constitutional right "to petition", and that at the very least, under the Claims Court and this Court's proceedings, Agustin should be afforded the interpretation, relevance, and applicability of the Tucker Act and/or the Back Pay with respect to each one of all his ten claims. See Agustin's ten claims at App. G-1 to G-3. Here, with all due and utmost respect, **Agustin hereby respectfully invokes (1) our U.S. Constitution's First Amendment which granted him the constitutional right "to petition" our federal courts, and (2) our Fifth Amendment's Due Process guarantee** that "no person [including Agustin] shall…be deprived of …liberty or property without due process of law": **for the interpretation, relevance, and applicability of the Tucker Act and/or the Back Pay Act** with respect to each one of all his ten claims. See App. J-1.

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[15] "No person [including Agustin] shall…be deprived of…property, without due process of law". Fifth Amendment, (bold and underline added). "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, 357 U.S. 197...(1958), for example--where a plaintiff's claim has been dismissed for failure to comply with a trial court's order--the Court read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' *Id.*, at 209". Logan, 102 S.Ct., at 1154.

Another reason why Agustin is invoking this Court's power of supervision is because, with respect to his back pay claim (CLAIM 4), **the Claims Court's 9-5-03 dismissal Order is in quite crystal clear violation of, or is quite contrary to, Worthington v. U.S., 168 F.3d 24, 27 (Fed. Cir. 1999) and our U.S. Supreme Court's Back Pay Act-case law in United States v. Testan, 424 U.S. 392, 405-406 (1976) (or "Testan") and in United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132 (2003) (or "White Mountain")**.

Worthington is the most quite controlling authority with respect to the issue that the MSPB lacks jurisdiction over Agustin's back pay claim of **the Navy's violation of 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995)**, and the Navy's violation of Agustin's pay, rights, or benefits pursuant to the said money-mandating authorities.[16] In addition, our U.S. Supreme Court's recent interpretation of its *expressio unius est exclusio alterius*-case law in Swierkiewicz v. Sorema N. A., 122 S.Ct. 992 (2002) is also another quite controlling authority with respect to the key and threshold issue of the Board's lack of jurisdiction over Agustin's back pay claim.[17]

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[16] "The Board's jurisdiction is not plenary, but limited to that conferred by law, rule, or regulation. Upon review of the relevant provisions, this court finds no law, rule, or regulation that gives the Board jurisdiction over [Agustin's) claim for violation of [65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) (1-1-03) and 20 CFR Section 10.310(a) (1995)]...See 5 U.S.C. §§ 7701(a), 7712". See Worthington, 168 F.3d, at 27, (bold and underline added).

[17] Please kindly take judicial notice of Agustin's 02/27/2003, (#46, at A-6), "Next Wave Motion" or "MOTION TO SUPPLEMENT

See App. L-1 to L-[6]. The Civil Service Reform Act's explicit mention of "any action which is appealable to the Board under any law, rule, or regulation" excludes any action which is not "appealable to the Board under any law, rule, or regulation". 5 USC Section 7701(a), (underline added). *Expressio unius est exclusio alterius.* See App. L-1 to L-[6].

Under the Tucker Act and the Back Pay Act, the Claims Court is "an appropriate authority", "a court" (5 CFR Section 550.803 (1-1-03)), which has exclusive jurisdiction over Agustin's back pay claim (CLAIM 4) which is over $10,000, **based on the Navy's 4-12-95 violation of all the said money-mandating statutes and regulations**. Contrary to the Claims Court's quite clear error of law in its 9-5-03 Order, at App. B-[6], Testan and White Mountain are quite controlling here, and not "*United States v. Fausto*, 484 U.S. 439 (1987)". The Navy's 4-12-95 "action[] include[s] personnel action[] and pay action[] (...in combination)" (5 CFR Section 550.803 (1-1-03), (underline added)) "which has resulted in the withdrawal or reduction of all" (5 USC Section 5596(b)(1)) of Agustin's pay, rights, or benefits, or "wrongful deprivation of [Agustin's] pay[, rights, or benefits]" (Testan, 424 U.S., at 406) from April 21, 1995 to the present time. The Navy's 4-12-95 unjustified or unwarranted personnel action, (which became effective on 4-

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THE RECORD IN THE INSTANT CASE BASED ON OUR U.S. SUPREME COURT'S RECENT REANNOUNCEMENT OF: (1) ITS "CLEARLY ESTABLISHED PRECEDENTS"-CASE LAW IN EARLY V. PACKER, U.S. NO. 01-1765 (11-4-02), AND (2) ITS FEDERAL AGENCY ACTION IN VIOLATION OF "ANY LAW"--SUCH ACTION MUST BE SET ASIDE-CASE LAW IN FCC V. NEXT WAVE PERSONAL COMMUNICATIONS, INC., [122 S.Ct. 832 (2003))". See App. K-1 to K-[7].

21-95), refused or "**fail[ed] to…confer…[Agustin's pay, rights, and] benefit[s]**" (5 CFR Section 550.803 (bold and underline added)), **had disobeyed and violated** 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), **had violated** Agustin's statutory and regulatory "'right[s] to…use'" (Philipps, 524 U.S., at 170) his accumulated annual leave and his accumulated sick leave as sick leave benefits "due to [his FECA approved] occupational injury" (exhibit 62), and in so doing, **had also violated** his constitutional rights, including his fundamental and substantive constitutional Due Process right to medical care or treatment, and had aggravated his occupational injuries and conditions, (see E-32).

The Tucker Act (28 USC Section 1491) contains an unequivocally expressed waiver of sovereign immunity for claims against the federal government which are over $10,000, and it "confers jurisdiction" (Germain, 503 U. S., at 253) to the Claims Court for such claims which the CSRA "does not reach" (Germain, id.), such as Agustin's takings claim and his back pay claim.[18] See App. M-1 to M-[7] concerning our U.S. Supreme Court's quite recent and quite

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[18] In White Mountain, 123 S.Ct. 1126, 1132 (2003), our U.S. Supreme Court announced its new "fair interpretation" rule or "fair inference"-case law and its "the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in a manner appropriate to waivers of sovereign immunity"-case law, which are quite controlling in the instant case. See App. M-1 to M-[7].

Please also kindly take judicial notice of Agustin's 03/31/2003, (#53, at [C-17]), "White Mountain Reply" or "REPLY TO: "DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO SUBMIT NEW AUTHORITY".

controlling "fair interpretation" rule or "fair inference"-case law. White Mountain, 123 S.Ct., at 1132.

The Back Pay Act (5 USC 5596) is an "Act of Congress" under the Tucker Act. 28 USC Section 1491(a)(1). 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), (which the Navy **had all disobeyed** and violated by its 4-12-95 "wrongful [or unlawful]...removal[]" (Testan, 424 U.S., at 405)) against Agustin), are all money-mandating "applicable law[s]...[or] regulation[s]" (5 USC 5596(b)(1)) within the meaning of the Back Pay Act, and each one of these "separate statutes and regulations" "creates a substantive right enforceable against the Government by a claim for money damages", or at the very least, "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' 463 U.S. at 217 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976) (internal quotation marks omitted)".[19] White Mountain, at 1132. See App. M-1 to M-[7]. Agustin respectfully presents and submits that this White Mountain case law is a quite recent, quite controlling authority with respect to his back pay claim, and the Claims Court's denial of Agustin's 03/14/2003 White Mountain Motion (#48, at [C-16]) was a

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[19] "'The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it...'" White Mountain, at 1135, (quoting Testan, 424 U.S., at 402). Here, Agustin, who has been duly appointed to his position (see App. E-37), is entitled to enjoy or exercise his statutory and regulatory "'right [or benefit] to...use'" (Philipps, 524 U.S., at 170) his "444.80" hours of accumulated annual leave and his "252.90" hours of accumulated sick leave (App. E-13) as sick leave benefits or entitlement "due to [his FECA approved] occupational injury" (App. E-62) pursuant to all the said money-mandating statutes and regulations.

quite crystal clear error of law and should be reversed by this Court.

Given the fact that the Navy's statutory and regulatory legal duties and obligations had been triggered on 2-16-95 (see footnote 1 above/App. K-[5]), Agustin's back pay claim that **the Navy's 4-12-95 personnel action** was "an unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)), **had violated all the said money-mandating statutes and regulations** and Agustin's pay, rights, or benefits pursuant to all the said authorities (65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995)), is justiciable and remediable in the Claims court pursuant to the Tucker Act, the Back Pay Act, and pursuant to our U.S. Supreme Court's governing, Back Pay Act-case law or "clearly established precedents" (Packer, 123 S.Ct., at 365) in United States v. Testan, 424 U.S. 392, 405-406 (1976) (or "Testan") and in United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132 (2003) (or "White Mountain") (see App. M-1 to M-[7]). The Claims Court's 9-5-03 dismissal Order--a quite crystal clear, travesty or miscarriage of justice--should be reversed by this honorable Court.

V. Whether (a) the Claims Court's 9-5-03 dismissal Order is in violation of, or contrary to, our U.S. Supreme Court's "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974) and in J.E.M. Ag Supply, Inc. v. Pioneer Hi-bred International, Inc., 122 S.Ct. 593, 605 (2001); and whether (b) the CSRA and the Back Pay Act "are capable of co-existence" in cases involving valid

personnel actions taken pursuant to the CSRA and also involving federal or postal employers' violation of our money-mandating statutes which is justiciable and remediable pursuant to the Tucker Act and the Back Pay Act?

Another reason why the Claims Court's 9-5-03 Order should be reversed by this Court is because it is in quite crystal clear violation of, or quite contrary to, our U.S. Supreme Court's "capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974) (holding that: "[w]hen two statutes (such as the Civil Service Reform Act and the Back Pay Act] are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective") and in J.E.M. Ag Supply, Inc. v. Pioneer Hi-bred International, Inc., 122 S.Ct. 593, 605 (2001) (citing "*Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253 (1992) (statutes that overlap 'do not pose an either-or proposition' where each confers jurisdiction over cases that the other does not reach"). The Tucker Act and the Back Pay Act "confer[] jurisdiction" to the Claims Court and provide statutory protection to federal and postal employees over federal and postal employers' personnel actions which violate our money-mandating statutes and regulations and which the CSRA "does not reach". Id.

Contrary to the Claims Court's "either-or proposition'' (503 U.S., at 253) conclusion at App. B-[6 to 7], which was a quite clear error of law, pursuant to our U.S. Supreme Court's "two statutes are capable of co-existence"-case law in Morton v. Mancari, 417 U.S. 535, 551 (1974), as a matter of law, "invalidating" (App. B-[7]) the Navy's 4-12-95 personnel action as "unjustified or unwarranted" (5 USC

Section 5596(b)(1)) **based on the Navy's violation of our money-mandating statutes and regulations** (65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1) (1-1-03), (2) and 20 CFR Section 10.310(a) (1995)) and of Agustin's pay, rights, or benefits pursuant to the said money-mandating authorities, is "effective" and is within the Claims Court's jurisdiction pursuant to the Tucker Act and the Back Pay Act. The Claims Court has "jurisdiction to rule on the validity of the Navy's action" (App. B-[6]) under the Tucker Act and the Back Pay Act.

"The Back Pay Act…The statute's [the Back Pay Act's] language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions". Testan, 424 U.S., at 405. These are personnel actions taken pursuant to the CSRA—"reductions in grade, removals, suspensions" (id.), but which are "wrongful", unlawful, against the law, or "'unwarranted or unjustified'" within the meaning of the Back Pay Act. Testan, id., at 405. In Agustin's case, the Navy's 4-12-95 personnel action maybe valid "beyond question" (App. B-[7]) pursuant to the CSRA, but it is quite clearly invalid, wrongful, unjustified, or unwarranted within the meaning of the Back Pay Act **based on the Navy's quite clear violation of our money-mandating statutes and regulations**--violation which the CSRA "does not reach" (Germain, 503 U. S., at 253). "Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay." Testan, id., at 406. Testan had quite clearly established that there is no irreconcilable

conflict between the CSRA and the Back Pay Act and that the two statutes are capable of co-existence.

Furthermore, the Claims Court's 9-5-03 dismissal Order is in conflict with, or is contrary to, our U.S. Supreme Court's federal agency action in violation of "any law"-such action must be set aside-case law in FCC v. Next Wave Personal Communications Inc., 122 S.Ct. 832 (2003), (or "Next Wave"), which is another relevant and controlling authority in the instant case.[20] Any agency action which violates any one of our statutes and federal regulations, such as the Navy's 4-12-95 personnel action against Agustin, is wrongful, unlawful, or against the law, and is therefore "unjustified or unwarranted" within the meaning of the Back Pay Act.[21]

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[20] **QUOTE**: "In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 413-414 (1971), (underline added), which was quoted at Next Wave, [at 838]. "'[F]ederal agencies must obey all federal laws, not just those they administer'... 254 F. 3d 130, 133 (2001)." Next Wave, [at 838]. (underline added). **UNQUOTE.** Quoted from pages 2-3, footnote 2, of Agustin's 02/27/2003, (#46, at [C-16], Next Wa[illegible]Motion. See App. K-2 [to 3].

[21] "Under Webster's New Universal Unabridged Dictionary, Deluxe Second Edition, © 1983, 'wrongful' means 'unlawful', and 'unlawful' means 'against the law'. Therefore, 'wrongful…personnel actions' are such personnel actions which are 'against the law' or not in accordance with 'any law' or any provisions of our U.S. Constitution—the supreme law of the land. See our U.S. Supreme Court's recent reannouncement of its governing, federal agency action in violation of 'any law'-such action must be set aside-case law in Next Wave." Page 2 of Agustin's Next Wave Motion, (#46, at A-6). See App K-2 [to 3].

As Agustin has repeatedly presented in the Claims Court, **the Navy is not above the law**—the Navy is not above our federal statutes and federal regulations, our U.S. Constitution's provisions (the supreme law of the land), and our U.S. Supreme Court's governing law or "clearly established precedents" (Early v. Packer, 123 S.Ct. 362, 365 (2002). "'[F]ederal agencies **must obey all federal laws**, not just those they administer'... 254 F. 3d 130, 133 (2001)." Next Wave, 123 S.Ct. 832, 838 (2003), (bold and underline added). See App. K-[2 to 3].

This honorable Court should not allow our Back Pay Act's provisions and its statutory protection to our federal or postal employees to become **useless and meaningless**, as what the Claims Court did in the instant case.

VI. Whether (a) the Claims Court's 9-5-03 dismissal Order is in violation of, or is contrary to, our U.S. Supreme Court's most recent announcement, reannouncement, or clarification of its Takings-case law in Brown v. Legal Foundation of Washington, 123 S.Ct. 1406 (2003); and whether (b) federal and postal employers' unconstitutional taking of federal and postal employees' statutory and regulatory pay, rights, or benefits under our money-mandating statutes and regulations, or the unconstitutional taking of their leave account, is justiciable and remediable pursuant to the Tucker Act?

Sick leave property, rights, or benefits, pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307) and 5 CFR Section 630.401(a)(1), (2) (1-1-03), are government created, cognizable property, rights, or interests

for purposes of the Takings Clause. As noted above, **prior** to the relevant 4-12-95 personnel action, Agustin's "entitlement to [sick leave] benefits had been established" (Sullivan, 119 S.Ct. 977, 990 (1999)), and "the interest of [Agustin] in continued receipt of these [sick leave] benefits is a statutorily created 'property' protected by the Fifth Amendment" (Mathews v. Eldridge, 397 U.S. 319, 332 (1976) (citation omitted)). Contrary to the Claims Court's quite clearly erroneous tunnel vision approach[22], given the undisputed and indisputable fact that the Navy's statutory and regulatory, legal duties and obligations had been triggered **prior** to the relevant 4-12-95 personnel action (see footnote 1 above/App.K-[5]), **the following are Agustin's cognizable property, rights, or interests, which the Navy had unconstitutionally took away without just compensation**, through its 4-12-95 personnel action:

1. Agustin's **statutory**, *regulatory*, and constitutional "'right[s] to…use'" (Philipps, 524 U.S., at 170) his leave account—the "private property of [Agustin] for purposes of the Takings Clause" (Philipps, 524 U.S., at 160)—his "444.80" (under "CURRENT EARNINGS" at

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[22] In a quite crystal clear error of law, and in deprivation of Agustin's Due Process rights to be heard and to a fair and full hearing on the merits of his claim with respect to the Navy's unconstitutional taking of Agustin's cognizable property, rights, or interests, (among others, his statutory and regulatory "'right[s] to…use'" (Philipps, 524 U.S., at 170) his "444.80" hours of accumulated annual leave and his "250.90" (see App. E-13) hours of accumulated sick leave as sick leave benefits or entitlement "due to [his FECA approved] occupational injury" (App. E-62)), **in violation of Agustin's Due Process rights, the Claims Court unfairly and unjustly limited Agustin's Takings claims only to** "property right to a monetary sum based on his sick leave balance at removal" (App. B-[7]).

App. E-13) hours of accumulated annual leave and his "250.90" (under "LEAVE" at App. E-13) hours of accumulated sick leave as sick leave benefits or entitlement "due to [his FECA approved] occupational injury" (App. E-62) pursuant to **65 Statute 681, Section 204 (codified at 5 USC Section 6307)**, *5 CFR Section 630.401(a)(1), (2) (1-1 -03)*, and his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment;

2. Agustin's statutory rights or benefits to accrue or earn additional annual leave and additional sick leave while on sick leave with pay status pursuant to 5 USC Sections 6303 and 6307, (see CLAIM 2 at App. G-1);
3. Agustin's unused and remaining, "252.90" (App E-13) hours of accumulated sick leave—the "private property of [Agustin] for purposes of the Takings Clause" (Philipps, 524 U.S., at 160), pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), (see CLAIM 1 at App. G-1; also see App. E-13);
4. The "Fifth Amendment" "protected" "interest of [Agustin] in continued receipt of these [sick leave] benefits" (Mathews v. Eldridge, 397 U.S. 319, 332 (1976)), at the very least, up to 6/6/95, based on Dr. Chattha's 3/6/95 medical report (App. E-14)[23];

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[23] On and after 4-21-95, based on Dr. Chattha's 3/6/95 medical report (App. E-14) (also see 5 USC Section 8147(b)), the Navy was fully aware of, and has total and complete knowledge, that Agustin has a great and urgent need to "receive[]" medical care or treatment, was "incapacitated" for work due to occupational "injury" (5 CFR Section

5. Agustin's fundamental and substantive Due Process rights or liberty interests to enjoy or exercise his statutory and regulatory rights pursuant to our money-mandating statutes or regulations (65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995]) and pursuant to his fundamental and substantive, constitutional Due Process right or liberty interest to medical care or treatment;
6. Agustin's fundamental and substantive Due Process rights or liberty interests to enjoy or exercise such money-mandating rights or benefits without any punishment or disciplinary action.

"[T]he dichotomy between personal liberties and property rights is a false one…The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, []a savings account" or a leave account.[24] Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

630.401(a)(1), (2)), and that his incapacitation for work would continue for 90 days or longer, or at least up to about 6/6/95. See App. D-[4 to 5].

[24] In the instant case, the Navy's 65 Statute 681, Section 204 and 5 CFR Section 630.401(a)(1), (2)-legal duties and obligations **had been triggered**, and Agustin's leave account—his accumulated sick leave and accumulated annual leave--are the private property of Agustin under the Takings Clause, which he has a fundamental and substantive Due Process-protected "'personal' right" to enjoy. Lynch, 405 U.S., at 552. The Navy's 4-12-95 personnel action was an **unconstitutional deprivation** of Agustin's fundamental and substantive Due Process rights or liberty interests "to enjoy those privileges long recognized…as

"[H]ere, the government physically took Agustin's constitutionally protected **[cognizable]** property, rights, or interests without just compensation in violation of our Fifth Amendment's Just Compensation Clause, through its 4-12-95 personnel action, **[for public use]** 'to promote the efficiency of the service' (exhibit 8) 'in accordance with the provisions of references (a) [CPI (Civilian Personnel Instructions) 339] and (b) [CPI 752]' (exhibit 4)". App. O-[5], (**bold** inserts added). See App. O-1 to O-[9].

Agustin respectfully presents and submits that Brown v. Legal Foundation of Washington, 123 S.Ct. 1406 (2003), (or "Brown")[25] is a quite controlling authority in the instant case. See App. O-1 to O-[9]. Here, Agustin has unquestionably satisfied" the "two conditions" in Brown, at 1417. The denial of Agustin's 03/31/2003, (#55, at [C-17]), Brown Motion and his takings claims were quite crystal clear errors of law and should be reversed by this Court.

Based on all the foregoing, the Claims Court's dismissal of Agustin's Takings claims was a quite clear error of law, and was in quite clear violation of, or is quite

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essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[25] Please kindly take judicial notice of Agustin's "Brown Motion" (03/31/2003, #55, at [C-17) or "MOTION FOR THIS COURT TO TAKE JUDICIAL NOTICE OF OUR U.S. SUPREME COURT'S REANNOUNCEMENT OF ITS...JUST COMPENSATION CLAUSE-CASE LAW IN BROWN V. LEGAL FOUNDATION OF WASHINGTON, [123 S.Ct. 1406 (2003)]". See App. O-1 to O-[9].

Please also kindly take judicial notice of Agustin's "Brown Reply" (04/22/2003, #61, at [C-17]) or "PLAINTIFF'S REPLY TO: "DEFENDANT'S RESPONSE TO PLAINTIFF'S FIFTH MOTION TO SUBMIT NEW AUTHORITY.

contrary to, our U.S. Supreme Court's Takings-case law in Brown.

VII. Whether (a) federal and postal employers' violation or deprivation of federal and postal employees' fundamental and substantive Due Process rights or liberty interests to enjoy or exercise their statutory and regulatory rights or benefits as federal employees is unconstitutional; whether (b) any punishment of federal or postal employees' enjoyment of their fundamental and substantive Due Process rights or liberty interests to exercise their statutory and regulatory rights or benefits as federal or postal employees is also unconstitutional; and whether (c) based on our U.S. Supreme Court's quite recent, constitutionally protected "speech"-case law in Virginia v. Black, 123 S.Ct. 1536, 1547 (2003) (or "Black") and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, 123 S.Ct. 1683, 1690 (2003) (or "Hyatt"), the Claims Court's 9-5-03 Order is in violation of, or is contrary to, our U.S. Supreme Court's "constitutionally protected conduct"-case law in Arnett v. Kennedy, 416 U.S. 134, 163 (1974)?

The Navy's 4-12-95 personnel action was ***unconstitutional*** because (a) such action deprived Agustin of his fundamental and substantive Due Process rights or liberty interests to enjoy his statutory and regulatory rights or benefits pursuant to the said money-mandating authorities; and/or (b) because **the sole cause for the Navy's 4-12-95 personnel action was Agustin's "constitutionally protected conduct"** (Arnett v. Kennedy, 416 U.S. 134, 163 (1974))--his enjoyment of his fundamental and substantive Due Process rights or liberty interests by his exercised of his

statutory and regulatory rights or "unavailability for duty" (App. E-4): his exercised of his Federal Employees' Compensation Act (FECA) continuation of pay rights from 12-15-93 to 1-31-94, his FECA compensation rights from 2-1-94 to 1-22-95, and his 65 Statute 681, Section 204 rights from 1-23-95 to 4-21-95. See 5th paragraph at App. D-1.

See App. Q-1 to Q-[10] with respect to our U.S. Supreme Court's quite recent, quite relevant, and quite controlling, constitutionally protected "speech"-case law in Virginia v. Black, 123 S.Ct. 1536, 1547 (2003) (or "Black") and its "no constitutionally significant distinction"-case law in Franchise Tax Bd. of Cal. v. Hyatt, 123 S.Ct. 1683, 1690 (2003) (or "Hyatt").[26] "'[T]he protection of [constitutionally protected]...speech' in Black [at 1547] and the protection of 'constitutionally protected ['speech' and] conduct' in Arnett (416 U.S. 134, 162, 163) has 'no constitutionally significant distinction' or difference. See Franchise Tax Bd. of Cal. v. Hyatt, [123 S.Ct. 1683, 1690 (2003)] (or "Hyatt").[27]" See App. Q-[5]; or Pages 4-5 of Agustin's "05/06/2003 Motion to Amend", #66, at App. [C-18].

"[W]e have held that Congress in establishing a standard of 'cause' for discharge did not intend to include within that term **any** constitutionally protected conduct."

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[26] Please also kindly take judicial notice of Agustin's "06/17/2003 Reply" (#72, at App. [C-18]) or "REPLY TO: 'DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND THE COMPLAINT'".

[27] In the instant case, Black, Arnett, and Hyatt are controlling authorities with respect to the quite relevant and quite controlling issue as to whether: in our U.S. Constitution's guarantee of constitutional protection, there is "no constitutionally significant distinction" or difference between constitutionally protected speech and constitutionally protected conduct. Hyatt, at page 10 of slip opinion.

Arnett v. Kennedy, 416 U.S. 134, 163 (1974)), (bold and underline added). **Such conduct includes the fundamental and substantive Due Process rights or liberty interests to enjoy or exercise statutory and regulatory rights or benefits under our money-mandating federal statutes and regulations, and violation or punishment of such conduct is justiciable and remediable in the Claims Court under the Tucker Act and the Back Pay Act**. Here, the Navy's 4-12-95 personnel action was unconstitutional because it "authorize[d] the punishment of constitutionally protected conduct".[28] Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). See App. Q-1 to Q-[10].

VIII. Whether the Claims Court's Order denying "[a]ll other outstanding non-dispositive motions" (App. B-6) by Agustin, (including Agustin's three (3) Motions to amend and his quite relevant motions for the Claims Court to take judicial notice of our U.S. Supreme Court's quite recent announcement, reannouncement, or clarification of its relevant or controlling case law, and his quite relevant 08/25/2003 Adams motion), was a deprivation or violation of Agustin's Due Process rights to be heard and to a fair and full hearing and/or briefing on the merits of all his claims, and/or whether such summary denial was a quite clear error of law.

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[28] In the instant case, the Navy's "ADVANCE NOTICE OF PROPOSED SEPARATION" (exhibits 4-5) was "a disciplinary action...It's a disciplinary action as far as the Board is concerned and that's what matters." [MSPB] ADMINISTRATIVE JUDGE LEE, (quoted from lines 9, and 13 thru 14, of exhibit 11 [App. E-11]). Under Webster's New Collegiate Dictionary, Copyright © 1975, "discipline" means "punishment".

The Claims Court's summary denial of all his outstanding motions, including Agustin's **three (3) Motions to amend**, which were all based on quite recent development, and all his quite relevant motions for the Claims Court to take judicial notice of our U.S. Supreme Court's quite recent announcement, reannouncement, or clarification of its case law, and his quite relevant 08/25/2003 Adams Motion (#84 at App. [C-20]), fatally prejudiced Agustin's fair and full presentation of his case, was a quite clear error of law, had violated FRAP Rule 15(d), had deprived Agustin's Due Process rights to be heard and to a fair and full hearing or briefing, and should be reversed by this honorable Court. See App. F-1 to F-[4], and D-[15 to 18].

"This Court [or any federal court] must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome." Fusari v. Steinberg, 419 U.S. 379, 391 (1975), (Mr. Chief Justice Burger, concurring). The quite recent announcement, reannouncement, or clarification of the governing law of the Supreme Court of the United States, which Agustin has informed the Court in his motions, like "the law of any State of the Union…is a matter which the courts of the United States are bound to take judicial notice". See Lamar v. Micou, 114 U.S. 218, 223 (1885).

[6. What action (relief) do you want the Court to take in this case?]

6. Agustin respectfully requests this Court to reverse the Claims Court's 9-5-03 Order and 9-8-03 Judgment, and to

grant all of Agustin's ten (10) claims, (see his ten claims at App. G-1 to G-[4]).

[7. Do you want to argue before this Court in person? No.]

Respectfully submitted, through and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
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U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REMIGIO I. AGUSTIN, Plaintiff-Appellant	)
v.	) No. 04-5010
UNITED STATES, Defendant-Appellee	)

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

With all due and utmost respect, this Court's March 3, 2004 panel per curiam decision overlooked or misapprehended the following points of law:

1) Whether, based on the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, this Court's 3-3-04 affirmance of the Claims Court's ruling that it did not have jurisdiction over Agustin's case pursuant to 28 USC Section 1500 is flawed as a matter of fact because it used an impermissible tunnel-vision approach and refused or failed to consider all the relevant and controlling facts in the instant case;

2) Whether, based on the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act, and

Takings claims, such affirmance is flawed as a matter of law because such ruling is quite "'contrary to'" the following U.S. Supreme Court's "clearly established law" or "governing law" (Mitchell v. Esparza, (or "Esparza"), 540 U.S. ___ (2003), U.S. No. 02-1369 (11-3-03) (page 4 of slip opinion))[1]: (a) our U.S. Supreme Court's "the facts upon filing"-"1500 requires a comparison"-case law in Keene Corp. v. United States, 508 U.S. 200, 207, 210 (1993) (or "Keene"); (b) its federal *res judicata* (issue preclusion)-case law; (c) its governing Federal Rules of Civil Procedure (FRCP) 41(b)-case law in Costelo v. United States, 365 U.S. 265, 286 (1961), (or "Costelo") and in Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek'); and (d) its Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999)?

3) Whether, based on the District Court's final, 5-23-01 and 6-8-01 lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, this Court's 3-3-04 affirmance of the Claims Court's lack of jurisdiction ruling over Agustin's Back Pay Act and Takings claims is in violation of, or contrary to, our U.S. Constitution's Full Faith and Credit provision (Article IV, Section 1) and our federal ***res judicata*** rules or case law?

4) Whether, based on the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, which cover the period from 12-18-96 to present, this Court's 3-3-04 opinion produces absurd and unconscionable unconstitutional result or condition, is unconstitutional, and is in violation of, or contrary to, our

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[1] See the Mitchell v. Esparza slip opinion in the internet at: http://www.supremecourtus.gov/opinions/02pdf/02-1369pdf

U.S. Constitution's First Amendment guarantee of the right "to petition" our federal courts "for a redress of grievances", and our Fifth Amendment Due Process guarantee of the rights to be heard and to have a fair and full hearing on the merits of his Back Pay Act and Takings claims, and deprives or violates Agustin's constitutional rights pursuant to the said constitutional provisions?

ARGUMENTS

With all due and utmost respect, this honorable Court's 3-3-04 panel decision was an impermissible, one-sided, tunnel-vision approach to all the relevant and controlling facts in the instant case with respect to the applicability of 28 USC Section 1500. This Court's 3-3-04 opinion was flawed as a matter of fact and as a matter of law.

1) This Court's 3-3-04 opinion is flawed as a matter of fact because it refused or failed to consider all the relevant and controlling facts, most importantly and specifically, the District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings[2] over Agustin's Back Pay Act and Takings claims.

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[2] The District Court ruled that Agustin "never asserted" a "claim of the Navy's unconstitutional taking of his sick leave". Footnote 2 at App. E-27/page 5 of District Court's 5-23-01 Order. "Plaintiff's termination violated or was not consistent with plaintiff's rights under 5 USC Section 6307 or FECA...The Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims." App. E-[30]/District Court's 5-23-01 Order, at page 9. E-23 to E-31 were attached to Agustin's 07/26/2001 "Notice of the District Court's decision resolving the jurisdiction issue...", which was **filed by leave of the Judge** on 07/26/2001, #18, at App. [AA-1 or C-13].

"The Claim Pursuant to 5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2) Plaintiff also requests that the Court alter its judgment

On 12-18-96, Agustin filed his Rehabilitation Act/Title VII Complaint before the District Court, *which involved distinctly different claims, and for distinctly different relief provided by 29 USC Section 794a(a)(1), including front pay and compensatory relief*, based on Agustin's claims pursuant to the Rehabilitation Act and Title VII. The Claims Court has no jurisdiction to adjudicate such claims and to grant such distinct and different relief under 29 USC Section 794a(a)(1). As a matter of law, Agustin could not file his Rehabilitation Act and Title VII claims before the Claims Court because that court has no jurisdiction over such claims.

Agustin, a pro se Complainant, in his 12-18-96 Complaint and throughout the District Court proceedings, erroneously believed that he has also presented his Takings claim and his Back Pay Act claim before the District Court: (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2 at App. E-27) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA" (App. E-[30] or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71)). See footnote 2 at App. E-27; E-[30]; and E-71.

In his District Court Complaint, Agustin pleaded that:

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with respect to his claim that the Navy's denial of paid sick leave violated the above-cited laws. The Court has reviewed plaintiff's Complaint in this case, and finds that plaintiff never alleged a cause of action under these statutes and regulations. See Complaint of December 18, 1996." App. E-71/District Court's 6-8-01 Order, at page 3. See 10/11/2001, #34, at App. [AA-2 or C-15], which was **filed by leave of the Judge**.

> [Page 19] Federal employees' rights, benefits, and pay, entitlement to which are established by service to public and country and are secured through laws passed by Congress [such as FECA, our money-mandating statutes, the Tucker Act, and the Back Pay Act] are government-created property interests protected by due process…[Page 27] THE REMOVAL ACTION WAS INVALID BECAUSE THE AGENCY IMPROPERLY AND UNFAIRLY DEPRIVED HIM OF A "TERM, CONDITION, OR PRIVILEGE" OF HIS FEDERAL EMPLOYMENT—THE BENEFIT TO USE HIS AVAILABLE SICK LEAVE AND ANNUAL LEAVE (FOR AN ACCEPTED OCCUPATIONAL INJURY AND CONDITION) [pursuant to FECA and our money-mandating statutes or regulations]—IN RETALIATION FOR HIS EXERCISE OF HIS FECA RIGHTS…[page 28] The use of accrued sick leave or annual leave is a benefit [pursuant to our money-mandating statutes or regulations] which is a "term, condition, or privilege" of appellant's federal employment …In addition, federal employees' pay, and benefits are statutorily created "property interest" [pursuant to our money-mandating statutes or regulations] which cannot be taken away without due process.

(Appellee's App. At 27-28 (emphasis in the original), (inserts added).)

As part of that Takings and Back Pay Act claims, which Agustin erroneously believed is part of his District Court Complaint, Agustin requested the District Court to provide the following relief:

> to order that he be reinstated to his position and that he be paid 100% of his full pay and benefits, including accrual of his annual leave and sick leave, minus the disability retirement pay (or [Federal Employees' Compensation Act, 5 USC Section 8101 et seq.] compensation pay) which he had received and would receive for the period from April 21, 1995 to the date of his total and complete rehabilitation, that is, the date when he starts making the same or more yearly income as he was making on April 21, 1995.

(Appellee's App. At 59-60 (emphasis in the original).)

On 8-9-99, the District Court granted summary judgment for the Navy and against Agustin with respect to all his Rehabilitation Act and Title VII claims. However, in its 8-9-99 Order, the District Court did *not* mention or did *not* make any ruling with respect to his Takings and Back Pay Act claims and his requested relief for such claims. Agustin then filed a series of motions for reconsideration in the District Court for that court to adjudicate his Takings and Back Pay Act claims based on his erroneous belief that he has presented such claims before it.

On 6-6-00, (#1, at App. [AA-12], after the District Court's August 9, 1999 decision (see App. B-3) over Agustin's distinct and different Rehabilitation Act and Title VII claims (wherein Agustin requested distinct and different reliefs which the Claims Court has no jurisdiction), and a decision which did not mention or did not make any ruling over any Takings claim or Back Pay Act claim, to protect his right to file a timely Back Pay Act and Takings claims

Complaint, he timely filed his Back Pay Act and Takings claims in the Claims Court, that the Navy:

> [page 13] "***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA--at the time when he needed it most. (See 5 USC Section 8118(c): 'An employee may use annual or sick leave' for a job-related disability; and 20 CFR 10.310(a): 'An employee who sustains a job-related disability may use sick or annual leave or both to avoid interruption of income')".

6-6-00, Complaint, at 13; also see "statutory right to 'use'" sick leave-claim at 15.

On 5-23-01 and on 6-8-01, the District Court finally made its lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims:

> (a) Agustin's "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2 at App. E-27) and (b) "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA" (App. E-[30]) or under "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71).

App. E-27, E-[30], and E-71.

The District Court ruled that Agustin "failed to allege these violations in his [District Court] Complaint" (App. E-[30]), or that Agustin "never alleged a cause of action under these statutes and regulations" (App. E-71). Agustin timely and duly presented the District Court's lack of jurisdiction

rulings before the Claims Court. See 07/26/2001; #18, #19, and #20; at App. [AA-1 or C-13].

Based on this Court's panel's refusal or failure to consider the most relevant and most controlling fact—the District Court's lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, this Court's 3-3-04 opinion should be reversed.

2) This Court's 3-3-04 opinion is flawed as a matter of law because, based on the District Court's final, 5-23-01 and 6-8-01 lack of jurisdiction rulings, Agustin has no claim "pending" in the district court, "for or in respect" (28 USC Section 1500) to any Back Pay Act claim or Takings claim from 12-18-96 to present, including at the time of filing of his Claims Court Complaint on 6-6-00. The District Court's lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims cover the period from 12-18-96 to present, including June 6, 2000—the date of filing of his Claims Court Complaint.

The District Court's 5-23-01 and 6-8-01 lack of jurisdiction rulings over the said two claims operate as federal ***res judicata*** (issue preclusion) over the issue of the Claims Court's jurisdiction over the said two claims, and makes 28 USC Section 1500 inapplicable in the instant case.

Here, based on the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act claim and Takings claim, which cover the period from 12-18-96 to present, Agustin's case is quite unique and exceptional, and the set of facts are materially distinguishable from any and all the other cases involving 28 USC Section 1500, including Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc). "By precluding jurisdiction over the

claim of a plaintiff with a suit pending in another court 'for or in respect to' the same claim, **1500 requires a comparison** between the claims raised in the Court of Federal Claims and in the other lawsuit." Keene, at 210, (bold and underline added).[3] Based on the District Court's final, quite clear and unequivocal lack of jurisdiction rulings that Agustin has no Back Pay Act and Takings claims before it from 12-18-96 to present, "comparison" between the claims in the two Complaints (in the District Court and in the Claims Court) is not possible, or is not required or necessary, because there is **no "comparable claim[]"to compare with** (Keene, at 210, (bold and underline added))—there is no Back Pay Act claim or Takings claim based on the violation of "5 USC Section 6307 and/or FECA" (App. E-[30]) or "5 USC Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71) to compare with. "[T]he facts upon filing" (Keene, at 207) include the fact that from 12-18-96 to present, there has been no Back Pay Act and Takings claims "pending" (28 USC Section 1500) before the District Court based on the District Court's final, 5-23-01 and 6-8-01 lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims.

Another reason why this Court's opinion is flawed as a matter of law is because based on the District Court's lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, there is **no final judgment on the merits** of such claims, and our U.S. Supreme Court's Federal Rule of Civil Procedure (FRCP) 41(b)-case law in Costelo v. United States, 365 U.S. 265, 286 (1961) (or "Costelo") and in

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[3] "'[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought'...subject matter jurisdiction turns on the facts upon filing"—"the time-of-filing rule...1500 requires a comparison between the claims". Keene, at 207, 210.

Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500-506 (2001) (or 'Semtek') is a quite controlling authority in the instant case, and the Claims Court has jurisdiction over such claims.

Furthermore, Agustin's Back Pay Act and Takings claims are each over $10,000 and our U.S. Supreme Court's Tucker Act-Claims Court's scope of jurisdiction-case law in Clinton v. Goldsmith, 526 U.S. 529, 539 n. 13, 540 n. 14 (1999) is quite controlling with respect to the Claims Court's exclusive jurisdiction over such claims. Agustin now understands that he "could not, as a matter of law, have raised [his] takings claims [and his Tucker Act-Back Pay Act claim] under the prior [District Court] litigation" (Adams v. The United States, CFC No. 00-447C (August 11, 2003), at footnote 9, page 8 of opinion.[4]

3) This Court's 3-3-04 decision is in violation of, or contrary to, our U.S. Constitution's Full Faith and Credit Clause and our federal ***res judicata*** rules or case law. See U.S. Constitution, Article IV, Section 1.

In the instant case, our U.S. Constitution's Full Faith and Credit Clause and federal ***res judicata***-rules or case law apply to the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims.[5]

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[4] See the Adams v. The United States opinion in the Internet at: http://www.uscfc.uscourts.gov/Opinions/Block/03/BLOCK.Adams.pdf

[5] "See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1604 (3d ed. 1988) ('It is clear that, where the federal court decided a federal question, federal res judicata rules govern')". Heck v. Humphrey, 512 U. S. 477, 488-489, n. 9 (1994). "In federal-question cases, the law applied is federal law. This Court has noted, 'It has been held in non-diversity cases, since Erie R. Co. v. Tompkins, that the federal courts will apply their own rule of res judicata.' Heiser v. Woodruff, 327 U.S. 726, 733

The Claims Court and this honorable Court are bound by our U.S. Constitution's provisions and our federal ***res judicata*** rules or case law. Both Courts have a continuous and continuing legal and judicial duty to observe, respect, and honor the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings Claims pursuant to our Full Faith and Credit Clause and our federal ***res judicata*** rules.

4) Based on all the records, it is beyond dispute that: (1) Agustin timely filed: (a) his 12-18-96, Rehabilitation Act-Title VII claims before the District Court; and (b) his 6-6-00, Back Pay Act and Takings claims before the Claims Court; (2) that the District Court ruled in its 5-23-01 and 6-8-01 lack of jurisdiction rulings that it did not have jurisdiction over Agustin's Back Pay Act and Takings claims—that Agustin has *no* Back Pay Act and Takings claims "pending" (28 USC Section 1500) before the District Court from 12-18-96 to present, including at the time of filing of his 6-6-00 Claims Court Complaint; (3) that the District Court did not transfer Agustin's Back Pay Act and Takings claims to the Claims Court; (4) that the District Court's lack of jurisdiction decision over Agustin's Back Pay Act and Takings Claims is "'final'" (Stoll v. Gottlieb, 305 U.S. 165, 170 (1938)) --that no higher appellate court has reversed the District Court's lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims; (5) that the Claims Court ruled that it also did not have jurisdiction over Agustin's Back Pay Act and

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(1946)." Blonder-Tongue Laboratories, Inc. *v.* University of Ill. Foundation, 402 U. S. 313, 324, n. 12 (1971). "[W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition.'" Stoll v. Gottlieb, 305 U.S. 165, 170 (1938).

Takings claims; and (6) that this Court affirmed the Claims Court's lack of jurisdiction ruling.

Based on all the above relevant and controlling facts, this Court's affirmance of the Claims Court's 9-5-03 ruling that it did not have jurisdiction over Agustin's Back Pay Act and Takings claims violates or deprives Agustin's First Amendment right "to petition" our federal courts "for a redress of grievances"[6], and his Fifth Amendment Due Process rights to be heard and to have a fair and full hearing on the merits of his Back Pay Act and Takings claims[7]. See U.S. Constitution, Amendment I and Amendment V.

With all due respect, this Court's 3-3-04 opinion produces absurd and unconscionable unconstitutional result or condition.[8] Since the District Court, and then the Claims Court, have ruled that it lack jurisdiction over Agustin's

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[6] "We have also considered the right to petition when interpreting federal law... We thus made explicit that 'the right to petition extends to all departments of the Government,' and that '[t]he right of access to the courts is...but one aspect of the right to petition.' [404 U.S.] at 510." BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 2396 (2002).

[7] "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v. Rogers*, 357 U.S. 197...(1958), for example--where a plaintiff's claim has been dismissed for failure to comply with a trial court's order--the Court read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' *Id.*, at 209". Logan, 102 S.Ct., at 1154.

[8] "Nothing in the statute [here, 28 USC Section 1500,] commands courts to shut their eyes to the Constitution or to deny a full and fair hearing when performing their [appellate] functions". Estep v. U.S., 327 U.S. 114, 127 (1946)

timely-filed and judicially cognizable Back Pay Act and Takings claims, and since this Court has affirmed the Claims Court's lack of jurisdiction ruling over such claims without considering or discussing the federal ***res judicata*** effect of the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, where and how on earth could Agustin enjoy and exercise his fundamental and substantive First and Fifth Amendment constitutional rights with respect to his Back Pay Act and Takings claims?

This Court's opinion is unconstitutional because it deprives Agustin of his First Amendment right "to petition the government for a redress of grievances" and it also deprives him of any judicial forum to enjoy or exercise his Fifth Amendment Due Process rights to be heard and to have a fair and full hearing on the merits of his timely filed and judicially cognizable Back Pay Act and Takings claims[9]. Based on the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, this Court's opinion is in violation of, or contrary to, our U.S. Constitution's First and Fifth Amendment provisions, and it violates or deprives Agustin's First and Fifth Amendment constitutional rights.[10] In light of Agustin's

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[9] "No person [including Agustin] shall...be deprived of...property, without due process of law". U.S. Constitution, Fifth Amendment, (bold and underline added). Under the "property" component of the Fifth Amendment's Due Process Clause, Agustin has a constitutional right to be heard and to a fair and full hearing on the merits of his Back Pay Act and Takings claims, which this Court's 3-3-04 opinion has violated or deprived.

[10] The right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights". Mine Workers *v.* Illinois Bar Assn., 389 U. S. 217, 222 (1967). "The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v. Avery, 393 U.S. 483, 485; Ex parte Hull, 312 U.S. 546, 549". California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). "[T]he

First and Fifth Amendments constitutional rights, and the District Court's final, lack of jurisdiction rulings over Agustin's Back Pay Act and Takings claims, this Court's opinion is quite clearly flawed as a matter of constitutional law.

With respect to the merits of Agustin's claims, he presents and submits that:

The Claims Court's summary denial (see App. B-6) of all of Agustin's motions, especially his three (3) motions to amend, which was based on then quite recent development, (see App. D-7 to D-9), was in violation of, or contrary to: Federal Rules of Civil Procedure (FRCP) Rule 15(a) and (d), and our U.S. Supreme Court's case law in Foman v. Davis, 371 U.S. 178 (1962). See App. F-1 to F-[4].

In 65 Statute 681, Section 204[11] (codified at 5 USC Section 6307), our U.S. Congress has established a constitutionally protected statutory "right to take sick leave" to federal employees. Hambsch v. U.S., 490 U.S. 1054, 1058

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right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances". Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983).

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U. S. 385, 394 [1914]. Our U.S. Supreme Court has acknowledged that the due process guarantee "includ[es] the right to be heard where liberty or property is at stake in judicial proceedings". Ownbey v. Morgan, 256 U.S. 94, 111 (1921).

[11] "(a) Officers and employees to whom this title applies **shall be entitled to sick leave with pay**...(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, **shall accumulate and be available for use** in succeeding years." 65 Statute 681, Section 204(a), (b), (bold and underline added).

(1989). At the issuance date (4-12-95) and at the effective date (4-21-95) of the relevant personnel/pay action (App. E-7 to E-8) Agustin has constitutionally protected-statutory rights, and regulatory rights, as well as constitutional rights, "to take sick leave" (id.) which the Navy had quite clearly violated.[12] See App. E-62 and E-6. Agustin, a duly appointed, career, competitive service federal employee, (see App. E-37), has statutory, regulatory, and constitutional "right[s] to take sick leave" (Hambsch, id., at 1058) due to his Federal Employees' Compensation Act (FECA)-approved occupational injury (see App. E-14) pursuant to 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5

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[12] : "[A]n agency **must grant sick leave** to an employee when the employee--(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth". 5 CFR Section 630.401(a)(1), (2), (bold and underline added). In the instant case, at the time of the relevant 4-12-95 personnel/pay action, it is undisputed and indisputable that Agustin has provided "medical certification" (5 CFR Section 630.403(b)) (see App. E-14) to the Navy that he was "receiv[ing] medical…treatment", and that he was "incapacitated for the performance of duties by [his FECA-approved occupational] injury" (5 CFR Section 630.401(a)(1), (2)).

Dr. Chattha's 3/6/95 medical report (App. E-14), showed the following quite relevant, clear and convincing evidence with respect to the Navy's 4-12-95 refusal or failure to fulfill its money-mandating, statutory and regulatory duties and obligations under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995):

Item 9: "IS EMPLOYEE TOTALLY DISABLED FOR USUAL WORK? YES";

Item 12: "WHAT TREATMENT IS EMPLOYEE RECEIVING AND HOW OFTEN IS IT GIVEN? home PT therapeutic exercises, psychiatric care for depression, Doxepein";

Item 15: "WILL DISABILITY FOR REGULAR WORK CONTINUE FOR 90 DAYS OR LONGER? YES [**or up to 6/6/95 or longer**]".

USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2), and/or 20 CFR Section 10.310(a) (1995) and pursuant to his substantive and fundamental Due Process rights or liberty interests to medical care or treatment, to enjoy such statutory and regulatory sick leave rights, pay, or benefits, and to enjoy such money-mandating rights or benefits without punishment or disciplinary action, which the Navy had all violated through its 4-12-95 personnel/pay action.[13]

65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) and 20 CFR Section 10.310(a) (1995), (which the Navy had all disobeyed and violated through its 4-12-95 "wrongful [or unlawful]" personnel/pay action (Testan, 424 U.S., at 405)) against Agustin, are all money-mandating "applicable law[s]…[or] regulation[s]" (5 USC 5596(b)(1)) **within the meaning of the Back Pay Act**, and each one of these "separate statutes and regulations" "creates a substantive right enforceable against the Government by a claim for money damages", or at the very least, "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' 463 U.S. at 217 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976) (internal quotation marks omitted)". White Mountain, at 123 S.Ct., at 1132. See App. M-1 to M-[7]. The Navy's 4-12-95 personnel/pay action was a "personnel action[] and pay action[] (…in combination)" (5 CFR

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[13] Agustin's constitutional claims are based on the constitutional admonishment that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." Perry v. Sindermann, 408 U.S. 593, 597 (1972). Agustin's constitutional claims have "underlying statutory or regulatory right[s] to recovery" which "support the Court of Federal Claims' jurisdiction under the Tucker Act". Hamlet v. U.S., 63 F.3d 1097, 1107 (Fed. Cir. 1995).

Section 550.803), which has resulted in the "wrongful deprivation of his [sick leave rights, benefits, or] pay" (Testan, at 406) to which he was "entitled by statute or regulation [under 65 Statute 681, Section 204 (codified at 5 USC Section 6307), 5 USC Sections 6303 and 8118(c), 5 CFR Section 630.401(a)(1), (2) or 20 CFR Section 10.310(a) (1995)]" (5 CFR Section 550.803); is covered under the Tucker Act and the Back Pay Act; and the Claims Court has jurisdiction over such claim.

The Navy's statutory and regulatory duties and obligations had been triggered, his 2-16-95 sick leave application (App. E-62) has been "approved" until his leave account "becomes exhausted" (App. E-6), Agustin's leave account--his unused and remaining 252.9 hours of accumulated sick leave and his 444.8 hours of accumulated annual leave (see App. E-13)--is the private property of Agustin for purposes of the Takings Clause, and Agustin has statutory, regulatory, and constitutional "'right[s] to…use'" (Philipps, 524 U.S., at 170) his leave account[14]. The Navy's unconstitutional taking of his property, rights, or interests without just compensation through its 4-12-95 personnel/pay action is justiciable and remediable in the Claims Court **pursuant to the Tucker Act and the Back Pay Act**, (not pursuant to the CSRA, Rehabilitation Act, or Title VII), **and pursuant to our U.S. Constitution's Takings Clause**.

Under our U.S. Supreme Court's governing law in United States v. Fausto, 484 U.S. 439, 446-448, 452-454

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[14] "[T]he dichotomy between personal liberties and property rights is a false one…The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, [] a savings account", or a leave account. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

(1987); United States v. Testan, 424 U.S. 392, 405-407 (1976); Morton v. Mancari, 417 U.S. 535, 551 (1974), Connecticut Nat. Bank v. Germain, 503 U. S. 249, 253 (1992), and J.E.M. Ag Supply, Inc. v. Pioneer Hi-bred International, Inc., 122 S.Ct. 593, 605 (2001) (or "J.E.M."); which are quite controlling here, "distinct cases" (J.E.M., id., at 605) involving personnel/pay action are covered under either the CSRA or the Back Pay Act, or under both statutes. Based on the facts in the instant case, **the Navy is not above the law, and the Navy *could not* obey the CSRA and violate our money-mandating federal statutes or federal regulations, or our U.S. Constitution's provisions, at the same time in the same action.**[15]

CONCLUSION

Based on all the relevant and controlling facts, and all the foregoing, this Court should grant this petition and reverse its 3-3-04 opinion; should rule that the Claims Court has jurisdiction over Agustin's Back Pay Act and Takings claims; should reverse the Claims Court's summary denial of all his motions; should review the merits of his timely filed and judicially cognizable claims **pursuant to the Tucker Act, the Back Pay Act, and our U.S. Constitution's provisions**, (not pursuant to the CSRA, Rehabilitation Act, or Title VII); and should grant all his claims for relief.

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[15] The Navy's 4-12-95 personnel/pay action "'do[es] not pose an either-or proposition'". J.E.M., 122 S.Ct. 593, 605 (2001). The Navy's 4-12-95 unjustified or unwarranted personnel/pay action is covered under Tucker Act and the Back Pay Act. The CSRA and the Back Pay Act are "capable of co-existence" (Morton v. Mancari, 417 U.S. 535, 551 (1974)). The CSRA "does not reach" (Connecticut Nat. Bank v. Germain, 503 U. S. 249, 253 (1992)) such personnel/pay action involving "wrongful deprivation of pay" (Testan, at 406) but the Back Pay Act does.

Respectfully submitted, through, and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN

MEMORANDUM OF SICK LEAVE APPROVAL

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from the Navy's 28 Feb 95 MEMORANDUM:

12630
052:BM
28 Feb 95

MEMORANDUM

From: Head, P-3 Weapon System Engineering Division (Code 052)

To: Remigio I. Agustin, P-3 Weapon System Engineering Division (Code 052)

Subj: REQUEST FOR SICK LEAVE

Ref: (a) Your ltr of 16 Feb 95

Encl: (1) Application For Leave

1. This is in response to reference (a) and to advise you that your request for sick leave is approved. A copy of your Application For Leave is provided herewith as enclosure (1). You are reminded that if your sick leave account becomes exhausted your absence will automatically be charged to annual leave and if that account becomes exhausted your absence will be charged to leave without pay.

/s/"B. MACLEAN"

MR. AGUSTIN'S LEAVE AND EARNINGS STATEMENT FOR PAY PERIOD ENDING: 04/29/95

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from his "CIVILIAN LEAVE AND EARNINGS STATEMENT" for "PAY PERIOD END 04-29-95":

DEPARTMENT OF DEFENSE
CIVILIAN LEAVE AND EARNINGS STATEMENT

Name: AGUSTIN, REMIGIO I.

CURRENT EARNINGS:	LUMP SUMP PAID 444.8 [HOURS OF ANNUAL LEAVE]
LEAVE:	
SICK [LEAVE]	252.9 [HOURS] CURRENT BALANCE

ATTENDING PHYSICIAN'S SUPPLEMENTAL REPORT

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from Dr. Chattha's 3/6/95 medical report:

Item 9: "IS EMPLOYEE TOTALLY DISABLED FOR USUAL WORK? YES";

Item 12: "WHAT TREATMENT IS EMPLOYEE RECEIVING AND HOW OFTEN IS IT GIVEN? home PT therapeutic exercises, psychiatric care for depression, Doxepein"; and

Item 15: "WILL DISABILITY FOR REGULAR WORK CONTINUE FOR 90 DAYS [OR UP TO 6/6/95] OR LONGER? YES".

RELEVANT EXCERPTS FROM U.S. DEPARTMENT OF LABOR'S APRIL 13, 2001 LETTER

Through its 4-12-95 personnel/pay action, the Navy, with deliberate indifference to Agustin's health and safety, in his utmost hour of need, inhumanely threw Agustin, an injured, in pain, and in suffering employee, into the streets with no income and no medical coverage whatsoever for his occupational injuries, pains, and sufferings, which had aggravated his medical and/or psychiatric conditions.

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from the U.S. Department of Labor's April 13, 2001 letter (see E-32):

"We have accepted your claim that you sustained an injury while in the performance of your duty as a federal employee. The specific condition accepted is: major depression (296.2); post-traumatic stress disorder (309.81); organic brain syndrome (294.1)".

NOTIFICATION OF PERSONNEL ACTION

Mr. Agustin hereby declares, under penalty of perjury, that the following excerpts information were copied, and typed verbatim here, from Agustin's Notification of Personnel Action, with effective date: "04-21-95":

"Name: AGUSTIN, REMIGIO I."

"Nature of Action: TERMINATION – DISABILITY"

"Position Title and Number: PLANNER AND ESTIMATOR" "WD-3418-08"

"Veterans Preference: 5-Point"

"Tenure: Permanent"

"Veteran Preference: YES"

"Retirement Plan: CSRS"

"Service Comp. Date: 09-13-68"

"Work Schedule: FULL TIME"

"Position Occupied: Competitive Service"

"REASON(S) FOR TERMINATION: UNAVAILABILITY FOR DUTY"

/s/ "J. EGGERS,
HEAD, EMPLOYEE RELATIONS BRANCH"

APPLICATION FOR LEAVE

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from Agustin's 2-16-95 APPLICATION FOR LEAVE:

1. Name: "Remigio I. Agustin"

2. Employee ID Number: "18930"

4-A From: "01-23[-95], 0615 AM"

4-B To: "Until further notice"

5. I hereby request: "Sick Leave"

6. Remarks: "Please cancel last application for leave requesting LWOP. Request sick leave due to occupational injury".

7. Employee's Signature: /s/"Remigio I. Agustin"

8. Date: (signed by employee) "2-16-95"

OFFICIAL ACTION ON APPLICATION

"check mark" Approved /s/"B. MACLEAN"

Date: (signed on) "2/28/95"

Remigio I. Agustin, Petitioner pro se
169 Austin Avenue
Hayward, California 94544
Telephone No. (510)-786-2819

IN THE

SUPREME COURT OF THE UNITED STATES

REMIGIO I. AGUSTIN, Petitioner,	)	U.S. NO. 02-814
v.	)	CA9 NO. 01-16364
GORDON ENGLAND, U.S. Secretary of the Navy, Respondent.	)	(U.S. Court of Appeals for the Ninth Circuit)

PETITIONER'S EX PARTE MOTION FOR THE COURT TO STAY OR WITHDRAW ITS MANDATE, AND TO RECONSIDER ITS DENIAL OF PETITIONER'S PETITION FOR REHEARING

Pursuant to Rule 21.2(c), Petitioner (or "Agustin"), a still-in-pain, injured and disabled individual, respectfully moves or requests this honorable Court's patience, understanding, and indulgence, and he respectfully moves or requests this Court to stay or withdraw its mandate, to take another look, and to reconsider its 4-7-03 denial of Agustin's

petition for rehearing, which was an inadvertent, quite crystal clear, travesty or miscarriage of justice.

In the instant case, Agustin has been inadvertently deprived forever of his Due Process-protected appeal as of right, there has been no adjudication upon the merits of his "timely" filed, 7-11-01 Notice of Appeal (App. [SC3-1]), which the Ninth Circuit quite erroneously extinguished in quite clear violation of this Court's governing law in U.S. v. Healy, 376 U.S. 75 (1964) and in U.S. v. Ibarra, 502 U.S. 1, 7, 6 (1991) and our U.S. Constitution's Fifth Amendment. "[I]t is better that all…motions [for reconsideration] be subsumed under one general rule—the rule laid down in Healy [U.S. v. Healy, 376 U.S. 75 (1964)]" that a motion for reconsideration "renders an otherwise final decision of a district court not final until it decides the" motion. U.S. v. Ibarra, 502 U.S. 1, 7, 6 (1991). See App. [SC3-1], wherein Respondent had admitted and conceded that Agustin's 7-11-01 "notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure." App. [SC3-1]. Pursuant to FRAP Rule 4(a)(4)(A)(iv), based on the District Court's *5-23-01 final decision* (App. [D-11 to 13]) over Agustin's 12-11-00 motion, his 60 days time for filing a Notice of Appeal of the District Court's 12-7-00 Judgment did not commence to run until after *5-23-01* (at the earliest), and his *7-11-01 notice of appeal* was "timely" filed. App. [SC3-1].

After the District Court issued its 12-7-00 Order and its 12-7-00 Judgment, Agustin timely filed his 12-11-00 Federal Rules of Civil Procedure (FRCP) Rule 59(e) motion to alter or amend judgment or motion for reconsideration. "[App. [E-23] On December 11, 2000 the Court received plaintiff's request for clarification of the December 7, 2000 Order, and his motion to withdraw the Judgment of the same

date...[On the same date, 12-11-00, the District Court ordered Defendant to respond to Plaintiff's 12-11-00 motion, and on 2-16-01, Defendant filed its response to Plaintiff's 12-11-00 motion (see App. M-2 to M-3, docket entries nos. 85 and 86)]...[App. [E-25]] Plaintiff's motion to reconsider was denied by Order of December 7, 2000. On the same date, the Court issued judgment in favor of defendants. Plaintiff then moved this Court to withdraw the judgment, and that [12-11-00] motion is now [--on 5-23-01--] before the Court...[App. [E-30]] the Court hereby CLARIFIES its Order of [App. E-31] December 7, 2000 and DENIES plaintiff's [12-11-00] motion to withdraw the Judgment of December 7, 2000". App. [E-23, 25, and 30]/ District Court's *5-23-01 Order* (underline added)). "Agustin filed a notice of appeal on *July 11, 2001*...This Court [the Ninth Circuit] has jurisdiction to hear the appeal pursuant to 28 USC Section 1291. Agustin filed his notice of appeal within sixty days of the District Court's order of June 8, 2001, denying leave to alter or amend the judgment. Therefore, his notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure." App. [SC3-1], (italics and underline added).

Mystifyingly, and in a quite crystal clear travesty or miscarriage of justice, the Ninth Circuit quite erroneously ruled that (1) it has "jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001" **based on Agustin's 7-11-01 notice of appeal**, and affirmed the said orders, but somehow, mystifyingly and quite erroneously concluded, that (2) **the same 7-11-01 notice of appeal was NOT timely filed**, thus extinguishing and depriving Agustin's Due Process-protected appeal as of right without affording him the Due Process that he is due, and which is guaranteed to him by our U.S. Constitution's Fifth

Amendment[1]--the opportunity for a fair and full hearing on the merits of his appeal. See [Agustin v. Dalton, 37 Fed. Appx. 895 (9th Circuit (June 17, 2002)].

Agustin, a still-in-pain, injured and disabled individual, who is an honorably-discharged Vietnam U. S. veteran and who had honorably, faithfully, and loyally served this great nation in times of war and peace for more than 26 years, and who had volunteered and had willingly offered his blood, limbs, and life to protect, defend, and fight for our U.S. Constitution and all that it stands for (in the same manner as our active duty veterans who are now in harms way in Iraq), while others flee out of the country to evade our military service law, now cries and begs for the protections and guarantees of the same Constitution which he had honorably served, in his long and nightmarish quest for justice. To date, Agustin is still mystified and still does not understand such miscarriage and travesty of justice. However, Agustin still hopes and prays that, in the end, justice would prevail.

Based on all the foregoing, this honorable Court should grant this motion.

Respectfully submitted, through, and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN, Petitioner pro se
169 Austin Avenue

Dated:
[received by the

---

[1] "No person [including Agustin] shall...be deprived of...property, without due process of law". Fifth Amendment, (bold and underline added), U.S. Constitution.

Hayward, California 94544
Telephone No. (510)-786-2819

Clerk on 4-15-03]

169 Austin Avenue
Hayward, California 94544
May 28, 2003

[Addressed and mailed, each to, the Chief Justice and to all the Justices]
Supreme Court of the United States
Washington, D.C. 20543-0001

Ref: (a) AGUSTIN V. ENGLAND, U.S. NO. 02-814

Encl: (1) PETITIONER'S EX PARTE MOTION FOR THE COURT TO STAY OR WITHDRAW ITS MANDATE, AND TO RECONSIDER ITS DENIAL OF PETITIONER'S PETITION FOR REHEARING, (or "4-15-03 Motion"), which was received by the Court on April 15, 2003

(2) Clerk's letter to Mr. Agustin dated April 16, 2003 returning Agustin's 4-15-03 Motion [not enclosed or attached]

Dear [Chief Justice/Justice]:

The undersigned, Mr. Agustin, was a Vietnam U.S. veteran, who had served this great nation with dedication, honor, and loyalty for more than 26 years, in times of war and in peace, as a veteran and as a federal employee. This request or petition is concerning his case above, see reference (a) and enclosures (1) and (2).

With all due and utmost respect to this honorable Court and to all the honorable justices in this honorable Court, Mr. Agustin very respectfully requests or petitions this honorable Court to please kindly inform him **how he**

could obtain true and real justice with respect to his case, at the very least, a Due Process opportunity for a fair and full hearing upon the merits of his timely filed 7-11-01 Notice of Appeal, and be heard?

To date, Mr. Agustin, a still-in-pain and disabled individual, still does not understand how the Ninth Circuit's 6-17-02 Memorandum opinion[1] and this honorable Court's rubber stamped of the Ninth Circuit's quite clearly erroneous deprivation of Agustin's constitutional Due Process right and his statutory appeal as of right would serve the interest of **true and real justice**.

Mr. Agustin is crying to you, is begging you in his knees, and is throwing himself before you and this Court for mercy, and for **true and real justice**, and to please kindly respond.

Respectfully submitted, through, and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN

---

[1] "Mystifyingly, and in a quite crystal clear travesty or miscarriage of justice, the Ninth Circuit quite erroneously ruled that (1) it has "jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001" **based on Agustin's 7-11-01 notice of appeal**, and affirmed the said orders, but somehow, mystifyingly and quite erroneously concluded, that (2) **the same 7-11-01 notice of appeal was NOT timely filed**, thus extinguishing and depriving Agustin's Due Process-protected appeal as of right without affording him the Due Process that he is due, and which is guaranteed to him by our U.S. Constitution's Fifth Amendment[]--the opportunity for a fair and full hearing on the merits of his appeal. See [Agustin v. Dalton, 37 Fed. Appx. 895 (9th Circuit (June 17, 2002)]." [App. SC1-3 to 4]/4-15-03 Motion.

169 Austin Avenue
Hayward, California 94544
Tel. No. (510)-786-2819

Copy to:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

NAVY'S BRIEF BEFORE THE NINTH CIRCUIT WITH RESPECT TO THE TIMELINESS OF AGUSTIN'S 7-11-01 APPEAL

Mr. Agustin hereby declares, under penalty of perjury, that the following information were copied, and typed verbatim here, from page 2 and page 3 of the Navy's Brief ("BRIEF FOR DEFENDANT-APPELLEE") before the Ninth Circuit:

QUOTE: "[Page 2] On December 7, 2000, the District Court denied plaintiff's motion for reconsideration and again entered judgment in favor of the defendant, but requested additional briefing. GER 141, 154; CD# 84, # 85. Thereafter, the District Court entertained several ex parte motions by Agustin, considering them motions for reconsideration or to amend or alter the judgment. On June 8, 2001, the District Court entered its order denying Agustin's motion to amend or alter the judgment. GER 170; CD # 90. Agustin filed a notice of appeal on July 11, 2001. GER 175; CD # 92.

This Court has jurisdiction to hear the appeal pursuant to 28 USC Section 1291. Agustin filed his notice of appeal within sixty days of the District Court's order of [page 3] June 8, 2001, denying leave to alter or amend the judgment. Therefore, his notice of appeal is timely under Rule 4(a)(4) of the Federal Rules of Appellate Procedure." UNQUOTE.

RELEVANT EXCERPTS FROM
Young and Young v. United States,
U.S. Court of Federal Claims No. 02-1368C (April 19, 2004)

NOTE: The following relevant excerpts was taken, and typed verbatim here, from page 1, and footnote 9 at pages 7-8 of the slip opinion in the internet at: http://www.uscfc.uscourts.gov/Opinions/Wolski/04/WOLSKI.Young.pdf

[Page 1: Issues involved:]

"Jurisdiction; 28 USC Section 1500;
pendency of dismissed claims;
lenient treatment of pro se litigants;
vacation of judgment under RCFC 60(b)".

[Page 7] [Footnote 9] "The meaning of the word 'pending', when used as an adjective in the legal context, is plain and well-understood. *See, e.g.*, Webster's Third New International Dictionary 1669 (1976) (providing as first definition, 'not yet decided: in continuance: in suspense'; Black's Law Dictionary 1154 (7th ed. 1999) (defining pending as '[r]emaining undecided; awaiting decision'). 'Pending' has had this common meaning at the time, and long before it was used in the predecessor to Section 1500—in section 8 of the Act of June 25, 1868, 15 Stat. 75, 77. *See e.g.*, William A. Wheeler, A Dictionary of the English Language 528 (1868) (defining pending as '[r]emaining undecided; in suspense'); *The Ouachita Cotton*, 73 U.S. 521, 527 (1868) (using [page 8] 'still pending' and 'awaiting adjudication' interchangeably); 11 Oxford English Dictionary 468 (2nd ed. 1989) (citing a 1797 usage of the term in a reference to legal proceedings)."

CHRONOLOGY OF RELEVANT EVENTS FOR THE PURPOSES OF 28 USC SECTION 1500

12-18-96 Agustin's Rehabilitation Act/Title VII Complaint was filed in the District Court in Remigio I. Agustin v. Secretary, Department of the Navy, United States District Court for the Northern District of California (or "District Court") No. C-96-4527.

08-09-99 The District Court granted summary judgment for the Navy and against Agustin with respect to all his Rehabilitation Act and Title VII claims. However, in this 08-09-99 decision, the District Court did ***not*** mention or did ***not*** make any ruling with respect to any Takings claim or any Back Pay Act claim based on the violation of "5 USC Section 6307 and/or under FECA" (06-06-00, Claims Court Complaint, at 13) . The District Court also did ***not*** "transfer" any Takings claim or any Back Pay Act claim to the Claims Court pursuant to 28 USC Section 1406(a) or 28 USC Section 1631.

06-06-00 To protect his substantive liberty interests or Due Process rights to file a timely Back Pay Act and Takings claims in a court of competent jurisdiction, Agustin filed his Complaint in the Claims Court, that the Navy: [page 13] "***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under

FECA". 06-06-00, Claims Court Complaint, at 13, (bold and italics in original).

12-07-00 The District Court reaffirmed its summary judgment for the Navy and against Agustin with respect to all his Rehabilitation Act and Title VII claims.

05-23-01 Based on Agustin's 12-11-00 and 02-05-01 motions for reconsideration of the District Court's 12-07-00 summary judgment, **the District Court has decided and made final, Federal Rules of Civil Procedure, Rule 41(b)-"lack of jurisdiction" ruling over any Takings or Back Pay Act claim based on violation of "5 USC Section 6307 and/or FECA" (App. E-30), which have *res judicata* (issue of jurisdiction-preclusion) effect with respect to the issue of the District Court's lack of jurisdiction over any such claims**. The District Court ruled that: (1) Agustin "never asserted" a "claim of the Navy's unconstitutional taking of his sick leave" (footnote 2, at App. E-27); and (2) that Agustin "failed to alleged these violations in his Complaint"—"his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA by terminating him". App. E-30. "[App. E-30] Having considered the parties' submission and the record in this case, the Court hereby CLARIFIES its Order of [App. E-31] December 7, 2000 and DENIES plaintiff's motion to withdraw the Judgment of December 7, 2000." App. E-30

to 31. See the District Court's 05-23-01 Order at App. E-23 to 31.

06-08-01 Based on Agustin's 05-31-01 motion for reconsideration of the District Court's 12-07-00 summary judgment, the District Court reaffirmed its 05-23-01, Rule 41(b)-"lack of jurisdiction" ruling with respect to: "[t]he Claim Pursuant to 5 USC Section 8118(c); 20 C.F.R. Section 10.310(a) [1995]; 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2) Plaintiff also requests that the Court alter its judgment with respect to his claim that the Navy's denial of paid sick leave violated the above-cited laws. The Court has reviewed plaintiff's Complaint in this case, and finds that plaintiff never alleged a cause of action under these statutes and regulations. See Complaint of December 18, 1996." App. E-71. The District Court also ruled that "the [District] Court believes that amendment of the Complaint at this late juncture—more than four years after the inception of the suit—would prejudice defendant, plaintiff may not now seek relief pursuant to these statutes and regulations". App. E-71 to E-72. "The Court DENIES plaintiff's ex parte motion for leave to alter or amend the judgment in this case. The Judgment of December 7, 2000 stands." App. E-72. See the District Court's 06-08-01 Order at App. E-69 to 72. **The District Court refused or failed to "transfer" (Keene, 508 U.S., at 215 n. 11, (bold added)), pursuant to 28**

USC Section 1406(a) or 28 USC Section 1631 (see App. C-4), any judicially cognizable Back Pay Act and Takings claims to the Claims Court.

07-11-01 Agustin's Notice of Appeal of the District Court's 12-07-00 summary judgment was filed by the District Court.

06-17-02 The Ninth Circuit issued its opinion over Agustin's 7-11-01 Notice of Appeal of the District Court's 12-07-00 summary judgment. "Remigio I. Agustin appeals pro se the district court's orders denying his [12-11-00, 2-5-01, 5-31-01, and 7-2-01] motions to reconsider [the district court's 12-07-00] summary judgment for the Navy in Agustin's employment discrimination action, and we affirm. We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a [7-11-01] notice of appeal within 60 days of those orders. *See Sch. Dist.No. 1J, Multnomah County v. ACandS, Inc.*, 5. F3d 1255, 1262 (9th Cir. 1993). We lack jurisdiction to address Agustin's [the same, 7-11-01] appeal of the district court's summary judgment because Agustin failed to file a notice of appeal within 60 days of entry of the order denying his timely, post-judgment tolling motion. *See* Fed. R. App. P. 4(a)(1)(B); 4(a)(4)(A)(iv) (2002); *Webb v. Ada County*, 285 F.3d 829, 836 (9th Cir. 2002)." Agustin v. Dalton, 37

Fed. Appx. 895 (9th Circuit (June 17, 2002)), (insert added). See App. SC7-1 to 2.

01-13-03 Agustin's petition for a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit (Agustin v. England, ___ U.S.___, 123 S. Ct. 903 (2003) (1-13-03)) was denied by the U.S. Supreme Court. **Thus, the District Court's 05-23-01 and 06-08-01, Rule 41(b)-"lack of jurisdiction" rulings over "the same [Back Pay Act or Takings] claim" (Keene, at 216) based on violation of "5 USC Section 6307 and/or FECA" (App. E-30), "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13), or "5 USC Section 8118(c); 20 C.F.R. Section 20.310(a) [1995]; 65 Statute 681, Section 204(b); 5 C.F.R. Section 630.401(a)(1)(2)" (App. E-71) has become absolutely final, and Agustin has never had any "pending" (28 USC Section 1500) Takings claim or Back Pay Act claim before the District Court based on violation of the said money-mandating authorities.** See App. SC4-1 for the meaning of the word "pending".

09-05-03 The Claims Court, in its 9-5-03 Order, (App. B-1 to 8), refused or failed to consider or discuss the Due Process-controlling effect and the *res judicata* (issue of jurisdiction-preclusion) effect of the District Court's 05-23-01 and 06-08-01, final, Rule 41(b)-"lack of jurisdiction" rulings that Agustin has "never alleged" (App. E-71) or "never

asserted" (footnote 2, at App. E-27) "the same [Back Pay Act or Takings] claim" (Keene, at 216) based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) or "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13) before the District Court. In the alternative, it also ruled that Agustin failed to state a claim upon which relief could be granted, *without* considering, discussing, or even mentioning the Tucker Act and the Back Pay Act—the statutes upon which relief could be granted and which Agustin has duly presented in support of his claims.

09-30-03 The Claims Court filed Agustin's Notice of Appeal to the Federal Circuit. See App. BB-to 40—Agustin's Informal Brief.

03-03-04 The Federal Circuit, in a per curiam opinion (App. A-1 to 7), also refused or failed to consider or discuss the Due Process-controlling effect and the *res judicata* (issue of jurisdiction-preclusion) effect of the District Court's 05-23-01 and 06-08-01, final, Rule 41(b)-lack of jurisdiction rulings that Agustin has "never alleged" (App. E-71) or "never asserted" (footnote 2, at App. E-27) "the same [Back Pay Act or Takings] claim" (Keene, at 216) based on violation of "5 USC Section 6307 and/or FECA" (App. E-30) or "5 USC Section 6307 and/or under FECA" (6-6-00, Claims Court Complaint, at 13) before the District Court, and it affirmed the Claims Court's 09-05-03, 28 USC Section

1500-lack of jurisdiction ruling over Agustin's Back Pay Act and Takings claims in the Claims Court.

03-09-04 Agustin timely filed his petition for panel rehearing and rehearing en banc. See App. CC-1 to CC-19—Agustin's petition for panel rehearing and rehearing en banc.

04-01-04 The Federal Circuit denied Agustin's petition for panel rehearing and rehearing en banc. See App. C-1.

RELEVANT EXCERPTS FROM
Adams v. United States
U.S. Court of Federal Claims No. 00-447C
(August 11, 2003)

NOTE: The following relevant excerpts was taken, and typed verbatim here, from footnote 9 at pages 7-8 of the slip opinion in the internet at:
http://www.uscfc.uscourts.gov/Opinions/Block/03/BLOCK.Adams.pdf

[Page 7] [Footnote 9] "Defendant also asserts that this case is barred under the doctrine of collateral estoppel, or issue preclusion, since the issues presented were decided by the D.C. Circuit in the preceding litigation. This court rejects that argument, however, under a well established exception to collateral estoppel [page 8] that blocks the doctrine's applicability where the party against whom preclusion is sought could not, as a matter of law, have raised the issue in the prior litigation. Since this court has exclusive jurisdiction over takings claim above $10,000, neither the D.C. Circuit Court nor the D.C. Circuit would have jurisdiction over plaintiff's claims. As a result, plaintiffs could not, as a matter of law, have raised their takings claims in the prior litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS Section 28 (1982) (noting that collateral estoppel is inappropriate where "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"); *See also Golden Pac. Bank Corp v. United States*, 15 F.3d 1066, 1073-1074 (Fed. Cir.), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994)."

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

REMIGIO I. AGUSTIN,
Plaintiff-Appellant

v.

JOHN H. DALTON, Secretary, U.S. Dept. of the Navy,
Defendant-Appellee.

No. 01-16364
DC No. CV-96-04527 DLJ

MEMORANDUM [1]

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Submitted June 10, 2002 [2]

Before: O'SCANNLAIN, BERZON, and RAWLINSON, Circuit Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Remigio I. Agustin appeals pro se the district court's orders denying his motions to reconsider summary judgment for the Navy in Agustin's employment discrimination action, and we affirm.

We have jurisdiction over the district court's orders dated May 23, 2001, June 8, 2001, and July 11, 2001, denying reconsideration, because Agustin filed a notice of appeal within 60 days of those orders. *See Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5. F3d 1255, 1262 (9th Cir. 1993). We lack jurisdiction to address Agustin's appeal of the district court's summary judgment because Agustin failed to file a notice of appeal within 60 days of entry of the order denying his timely, post-judgment tolling motion. *See* Fed. R. App. P. 4(a)(1)(B); 4(a)(4)(A)(iv) (2002); *Webb v. Ada County*, 285 F.3d 829, 836 (9th Cir. 2002).

We review the district court's denial of Agustin's motions to reconsider for an abuse of discretion. *ACandS, Inc.*, 5 F.3d 1255 at 1262. The district court correctly denied Agustin's motions because it did not apply incorrect law or utilize erroneous facts. See id.

Agustin's motions to present additional citations, to withdraw additional citations, and to supplement the record are granted. Agustin's motion to stay further action is denied as unnecessary.

AFFIRMED.

Remigio I. Agustin, Plaintiff, pro se
169 Austin Avenue
Hayward, California 94544
Telephone No. (510)-786-2819

U.S. COURT OF FEDERAL CLAIMS

REMIGIO I. AGUSTIN, Plaintiff	)	
v.	)	No. 00-335C (Senior Judge Merrow)
UNITED STATES, Defendant.	)	

PLAINTIFF'S NOTICE OF THE DISTRICT COURT'S DECISION RESOLVING THE JURISDICTION ISSUE CONCERNING PLAINTIFF'S CLAIMS UNDER 5 U.S.C. SECTION 6307 OR FECA (FEDERAL EMPLOYEES COMPENSATION ACT)

PLEASE TAKE NOTICE that in a May 23, 2001 Order, the U.S. District Court for the Northern District of California issued an Order in Agustin v. Dalton, C-96-4527 DLJ, which has resolved the jurisdiction issue concerning plaintiff's claims in this honorable Court: the unconstitutional and/or unlawful taking or obliteration of his rights or property granted to him by law under 5 USC Section 6307 and/or FECA. See attached, May 23, 2001 District Court Order [at App. E-23 to E-31].

(Note 1: "[P]laintiff argues this [the district court] Court failed to rule on his claim that the Navy violated his

rights under 5 USC Section 6307 and/or FECA by terminating him. The Court has reviewed plaintiff's complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims." May 23, 2001 Order, at [App. E-30], of the U.S. District Court for the Northern District of California, in Agustin v. Dalton, C-96-4527 DLJ.) In his 5-18-00 Complaint with this honorable Court, plaintiff pleaded that: "**(1) The United States unconstitutionally and/or unlawfully took away his constitutionally protected property--his 252.9 hours of accumulated sick leave--without just compensation, upon his *wrongful, unlawful, and/or unconstitutional* disciplinary removal from Navy federal employment on April 21, 1995 solely by reason of his accepted, occupational injury or condition, in very clear violations of the Taking, Due Process, and the Equal Protection provisions of our U.S. Constitution** [at page 1]...With its disciplinary removal decision, the Navy, with impunity, ***unlawfully and/or unconstitutionally*** obliterated his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA--at the time when he needed it most [at page 13]. Plaintiff's 5-18-00 Complaint in this Court, at page 1 and 13.)

The district court's May 23, 2001 Order is another reason or evidence why this honorable Court has jurisdiction over these claims, that these claims before this Court are distinctly different, that these claims were not before the district court, and the district has ruled very quite clearly and explicitly that it "cannot adjudicate those claims". District Court's May 23, 2001 Order, at [App. E-30].

Another reason why this Court has jurisdiction is because plaintiff's money claim involving these claims is

more than $10, 000.00 and this Court has sole jurisdiction over such claim pursuant to the Tucker Act. See Note 2 concerning the equivalent money amount of leave benefits that he lost based on the Navy's violations of his constitutional and/or statutory rights.

(Note 2: "[I]f the personnel action had not occurred", complainant would exercise his constitutionally protected, statutory rights under FECA and/or 65 Statute 681, Section 204(b) to "use" his accumulated sick (252.9), annual (240 + 56 = 296), and restored leave (148.8), a grand total of (252.9 + 296 + 148.8) of 697.9 hours, which is equivalent to (697.9/80 hours per pay period) 8.72125 pay periods. In 8.72125 pay periods, complainant would earn 8 hours of annual leave plus 4 hours of sick leave per pay period, or a total of (8.72125 x 12 = 104.655 hours) 104. 655 hours, which he would also use. Using 104.65 hours of accumulated leave would earn him (104.655/80, then times 12), another 15.698 hours of accumulated annual and sick leave (and on and on and on...until his accumulated leave is completely exhausted). 104.655 plus 15.698 equals 120.353 hours, which is equivalent to (120.353 x $28.47, his hourly rate) $3426.45. This is in addition to his lost or forfeited 252.9 hours of accumulated sick leave or (252.9 x $28.47) $7200.06. Assuming his friend's calculation is correct, $3426.45 plus $7200.06 equals **$10626.51**." Note 1, at pages 4-5, of plaintiff's 6-5-00 pleading (filed on 6-13-00). Also see Exhibit 6 of plaintiff's 5-18-00 Complaint in this Court, ("[Y]our request for sick leave is approved. You are reminded that if your sick leave account becomes exhausted your absence will automatically be charged to annual leave and if that account becomes exhausted your absence will be charged to leave without pay.").

Plaintiff presents and submits that, with the sole exception of this honorable Court, he has no other judicial recourse to pursue and maintain his judicially cognizable claims of the Navy's unconstitutional and/or unlawful violation or deprivation of his constitutionally protected rights or benefits under 5 USC Section 6307 and/or FECA. Plaintiff has suffered an actual, injury in fact, and Fairness, Due Process, and Justice require and compel this honorable Court to deny defendant's motion to dismiss and to fully adjudicate plaintiff's judicially cognizable claims, including his unconstitutional statute claim that 65 Statute 681, Section 204(b)--the sick leave insurance contract between the federal government and federal employees (you "accumulate", you "use" contract/statute)--is unconstitutional, violates our U.S. Constitution's guarantee of equal protection of the laws, because it applies unfairly to disabled federal employees. Please kindly refer to pages 14-16 of plaintiff's 5-18-00 Complaint.

5 U.S.C. Section 8118(c), 20 CFR Section 10.310(a), 65 Statute 681, Section 204, and 5 CFR 630.401(a)(1), (2) granted plaintiff and all federal employees a fair and equal, constitutionally protected, statutory or regulatory rights to use sick leave--his accumulated sick leave, accumulated annual leave, or both--due to occupational injury. See exhibit 6 of plaintiff's 5-18-00 Complaint. Plaintiff also has a substantive, constitutional right to medical care or treatment, which the government has violated or deprived when it violated or deprived his rights or benefits under these statutes and regulations. "It [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests". Perry v. Sindermann, 408 U.S. 593, 597 (1972). Perry v. Sindermann applies in the instant case and is the **controlling authority** pertaining to this specific constitutional claim. These statutes and/or regulations

granted plaintiff constitutionally protected, rights or benefits independent of the Rehabilitation Act. "As the Supreme Court noted, when there is a legal right without a legal remedy, the right has little meaning." N.A A.C.P. v. Medical Ctr. Inc., 599 F.2d 1247, 1254-5 (3rd Cir.1979).

Plaintiff respectfully suggests that based on the District Court's May 23, 2001 Order [App. E-23 to 31], this honorable Court should order the defendant to respond and to show cause why defendant's motion to dismiss should not be denied by this honorable Court, within a reasonable time to be determined by the Court.

Sincerely, through, and with help and assistance from anonymous friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN

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U.S. COURT OF FEDERAL CLAIMS

REMIGIO I. AGUSTIN, Plaintiff	)	
v.	)	No. 00-335C
	)	(Senior Judge Merrow)
UNITED STATES, Defendant.	)	

PLAINTIFF'S REPLY TO: "DEFENDANT'S OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND HIS COMPLAINT"

Pursuant to this honorable Court's Rule 83.2(b), plaintiff (or "Agustin") is hereby filing this reply.

REPLY TO DEFENDANT'S OPPOSITION TO INCLUDE AGUSTIN'S TAX REFUND CLAIMS FOR TAX YEARS 1996 AND 1997 (OR CLAIM 5) IN THE INSTANT COMPLAINT

Plaintiff's 8-30-01 motion for leave to amend the instant Complaint to include his tax refund claims for tax years 1996 and 1997 (or Claim 5) is not futile. This honorable Court has subject matter jurisdiction over these claims pursuant to 28 USC Section 1346(a)(1) and/or 28 USC Section 1491(a), based on the government's deprivation

or violation of plaintiff's substantive, statutory rights pursuant to the Federal Employees Compensation Act (FECA) and *26 USC Section 104(a)(1)*, which granted all FECA compensation recipients, including Agustin, the same and fair and equal, substantive, statutory rights to *tax-free*, FECA compensation, which are money-mandating in nature, and which are "applicable law[s]" within the meaning of the Back Pay Act. These claims are valid, timely-filed, judicially cognizable claims; are not frivolous; are sufficient on their face based on the undisputed and indisputable, proven sets of facts which plaintiff has established; these claims are not covered under the Civil Service Reform Act (CSRA); and these claims have not been addressed, and were not, or are not, pending, in any other court. With respect to these claims, defendant has not disputed or questioned even one relevant fact, among the relevant underlying facts, presented by Agustin. "'This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.'" Board of Governors v. Mcorp Financial, 112 S. Ct. 459, 465 (1991) (quoting 358 U.S., at 190). "Here…absence of jurisdiction of the federal courts would mean a sacrifice or obliteration of a right which Congress has given [federal] employees, for there is no other means, within their control…to protect and enforce that right." See Mcorp, id., at 466 (internal quotation marks and citation omitted). Based, and as applied to the facts in the instant case, defendant's futility-argument is, plainly and simply, totally and completely without merit.

The DOL's 2-10-95 decision, which suspended Agustin's FECA benefits effective on 1-23-95, is not relevant in this case. Since February 2, 1995, Agustin has been ready and willing to attend the medical examinations required by DOL. See the DOL's April 13, 2001 decision, (exhibit 34), which granted Agustin's FECA benefits retroactive from

February 2, 1995 to present. In any case, the issue as to whether the Secretary of Labor's suspension of FECA benefits procedures are unconstitutional is not before this honorable Court.

In the instant case, Agustin's 448 hours of sick leave claim (in Claim 1), his 1995 tax refund claim for the period from 2-2-95 to 4-21-95 (Claim 3), and his 1996 and 1997 tax refund claims (Claim 5) first accrued, or became due, on April 13, 2001, based on the DOL's determination (in exhibit 34) that he has a statutory right and entitlement to *tax-free*, FECA compensation for the period from February 2, 1995 to present. See exhibit 34. With respect to these three (3) claims, the relevant, key and threshold, dispositive fact is: Agustin's legal entitlement, and his constitutionally protected rights, property, or interests, to *tax-free*, FECA compensation for the period from February 2, 1995 to present, were established by an appropriate authority--the U.S. Department of Labor (or "DOL")--on April 13, 2001, not before. See Note 1 below.

(Note 1: Excerpts from Note 1, pages 9-10, at Agustin's 9-5-01 filing: QUOTE: "[T]he language 'when due' must be construed to mean when benefits are allowed". California Human Resources Dept. v. Java, 402 U.S. 121 (1971). The Federal Circuit instructs that "a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action", see Hopland Band of Pomo Indians v. United States, 855 F. 2d 1573, 1577 (Fed. Cir. 1988), at which time "'the plaintiff has a legal right to maintain his or her action.'" Catawba Indian Tribe of S. C. v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (quotation omitted). **Prior to the DOL's April 13, 2001, FECA benefits entitlement determination (exhibit 34), Agustin's tax-free**

FECA compensation benefits have not been allowed, he was not entitled to institute an action, and he has no legal right to maintain his claims for the 448 sick leave hours and the 1995, 1996, and 1997 tax refunds. UNQUOTE.)

Here, the DOL's 4-13-01 action has summarily obliterated or "destroy[ed] [Agustin's] property interest[s][--his property rights or interests to *tax-free* FECA compensation for the period from February 2, 1995 to December 31, 1997], by operation of law" (by operation of 26 USC Section 6511), or by its "'established [federal] procedures'"; has violated his constitutional right to equal protection of the laws under the equal protection component of our U.S. Constitution's Fifth Amendment; has violated his constitutional right to protection from the unconstitutional taking of his rights, property, or interests without just compensation; and has deprived his Due Process rights to have an "opportunity" to be heard with respect to these three (3) claims "'at a meaningful time and in a meaningful manner'", (see Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1158-9 (1982) (citation omitted).

With respect to Agustin's 1996 and 1997 tax refund claims (Claim 5), based and as applied to the facts in the instant case, the IRS' August 27, 2001 denial (exhibits 58-59) of his 1996 and 1997 tax refund claims was unconstitutional: (1) because of the IRS' unconstitutional, no exemption per se rule in applying 26 USC Section 6511, an unconstitutional per se rule which violates adversely affected FECA compensation recipients' Equal Protection-constitutional right, and which violated Agustin's Equal Protection-constitutional right; (2) because of the unconstitutional, Due Process-violative, pre-determined outcome of denial of his claims based on such a per se rule; (3) because the IRS did not even address the merits of his relevant arguments and the

controlling authorities he has raised and presented; and (4) because such lip-service, adjudication proceedings of constitutionally protected property rights or interests do not comport with our U.S. Constitution's Due Process guarantee, and has deprived Agustin's Due Process rights to a "fair and full hearing" of his claims. See Carter v. Kubler, 320 U.S. 243, 247 (1943).

Based on Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982), and our U.S. Constitution's Due Process guarantee, as part of the relief in the instant case, Agustin respectfully requests this honorable Court to provide him "what process is due him": a Due Process "opportunity" to be heard "'at a meaningful time and in a meaningful manner'", by hearing and adjudicating the merits of these three (3) timely-filed, judicially cognizable claims, and by granting him appropriate relief. Logan, id., at 1156, 1159.

With all due and utmost respect, Agustin presents and submits that, before this honorable Court, **Agustin has a constitutional, Due Process right to have his day in court with respect to these three (3) timely-filed, judicially cognizable claims** based on the government's violations of Agustin's "clearly established statutory or constitutional rights" upon which relief can be granted. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). And as plaintiff has presented before, without allowing Agustin to amend the instant complaint to include these three (3) claims--his 448 hours of sick leave claim (in Claim 1); his 1995 tax refund claim for the period from 2-2-95 to 4-21-95 (Claim 3); and his 1996 and 1997 tax refund claims (Claim 5)--he has no other choice except to file another Complaint in this Court or the appropriate U.S. District Court. Such Complaint would be a related case with the instant Complaint, would involve the same relevant and material, operative facts, the same

issues, and the same controlling authorities, and would be piece meal judicial adjudication of his claims. With all due and utmost respect to this honorable Court, such related Complaint, which could be, and should be, consolidated and adjudicated with the instant Complaint, would be a waste of our federal courts' judicial time, energy, and resources. A court may consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation. See Chitimacha Tribe of Louisiana v. Harry L. Laws Company, 690 F. 2d 1157, 1163 (5th Cir. 1982), which is a controlling authority compelling the granting of this motion. Forman v. Davis, 371 U.S. 178, 182 (1962) is another controlling authority which compels and requires granting Agustin's motion. Here, based on Forman v. Davis, there is no reason why this Court should deny Agustin's motion. Most importantly, another reason why Agustin's motion should be granted is because the information necessary for such an amendment--the U.S. Department of Labor's (DOL) April 13, 2001 decision (exhibit 34), which granted Agustin a statutory right or entitlement to the payment of tax-free FECA compensation from February 2, 1995 to present, and the IRS' August 27, 2001 denial (exhibits 58-59) of his 1996 and 1997 tax refund claims--**were not available** to Agustin when he filed his June 6, 2000, original Complaint in this Court. Exhibit 34 was attached to plaintiff's 7-27-01 motion, and exhibits 58-59 were attached to plaintiff's 8-30-01 motion.

Based on all of the above, and plaintiff's 8-30-01 motion and 9-5-01 reply, his motion for leave to include his tax refund claims for tax years 1996 and 1997 (or Claim 5) in the instant Complaint, should be granted.

REPLY TO DEFENDANT'S 28 USC SECTION 1500 ARGUMENT

Since the defendant keeps reasserting its 28 USC Section 1500 argument, (see page 4 of defendant's 10-1-01 opposition/filing; and page 1-2 of defendant's 9-14-01 response), and other futile arguments, Agustin would like to have this Due Process opportunity to reply to such futile arguments, which are all totally and completely without merit.

In Agustin's timely-filed, June 6, 2000 Complaint before this honorable Court, (see Note 2 below), he timely raised and presented his claim that:

(Note 2: "With its [April 12, 1995] disciplinary removal decision, the Navy, with impunity, ***unlawfully and/or unconstitutionally*** obliterated **his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA**--at the time when he needed it most." June 6, 2000 Complaint, at page 13, (bold and underline added); also see the Navy's April 12, 1995 action against Agustin--DECISION ON PROPOSED SEPARATION, (plaintiff's exhibits 7-8, which were attached to Agustin's 6-6-00 Complaint. It is very important to note that Agustin served the District Court with a copy of this Complaint. See the Certificate of Service, which was attached to Agustin's June 6, 2000 Complaint with this Court).

In this case, from the timely filing of Agustin's June 6, 2000, original Complaint, this honorable Court and the defendant have been timely and fully apprized of Agustin's **claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA**, and the defendant, since then and up to the present time, has a fair and full opportunity to respond to such timely-filed, judicially cognizable claim. See Note 2 above.

In its May 23, 2001 Order, (see Note 3 below), the District Court, having been fully aware of Agustin's claim with this Court that the Navy violated his "**statutory rights under 5 USC Section 6307 and/or under FECA**" (June 6, 2000 Complaint, at page 13, (bold and underline added)), in plain English, very clearly and very explicitly, fully litigated and adjudicated the jurisdiction issue for or in respect to **his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA**, and ruled that:

(Note 3: "Finally, plaintiff [or "Agustin"] argues this [District] Court failed to rule on **his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA** by terminating him. The Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within. Therefore, because plaintiff failed to allege these violations in his Complaint, this Court cannot adjudicate those claims." See page 9 of the May 23, 2001 District Court's Order, (at plaintiff's [App. E-30]), (bold and underline added).)

In addition, in its June 8, 2001 Order, at page 3 (or attached exhibit 71 [App. E-71]), the District Court, with respect to **his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA**, ruled that:

"The Claim Pursuant to 5 U.S.C. Section 8118(c); 20 C.F.R. Section 10.310(a); 65 Statute 681, Section 204 [(a)] (b); 5 C.F.R. Section 630.401 (a) (1) (2)

Plaintiff [or Agustin] also requests that the [District] Court alter its judgment with respect to **his claim that the Navy's denial of paid sick leave violated the above-cited laws**. The Court has reviewed plaintiff's Complaint in this case, and finds that **plaintiff never alleged a cause of action**

under these statutes and regulations. See Complaint of December 18, 1996." District Court's June 8, 2001 Order, at page 3, (exhibit 71 [App. E-71]), (bold and underline added). See attached exhibits 69-72 [or App. E-69 to 72].

Please also kindly see and refer to the District Court's July 11, 2001 Order (exhibit 63)--its last and final Order--which did not change the District Court's final, litigation and adjudication of the jurisdiction issue for or in respect to "**his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA**". [App. E-30], (bold and underline added). [App. E-30] was attached to Agustin's 7-23-01 notice/filing, and Exhibit 63 was attached to Agustin's 9-5-01 reply/filing.

Agustin presents and submits that the district court's May 23, 2001 Order has very clearly fully litigated the jurisdiction issue as to whether, at the time of filing of the instant Complaint in this Court, Agustin has a claim pending in any other court for or in respect to "**his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA**", within the meaning of 28 USC Section 1500. [App. E-30], (bold and underline added).

Here, it is irrelevant whether Agustin or the defendant agrees or not with the district court's May 23, 2001 jurisdiction ruling that Agustin did not raise or present **his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA** before the district court. See [App. E-30]. What is relevant to defendant's futile, 28 USC Section 1500 argument was the "time-of-filing rule" or "the state of things at the time of" filing of the instant Complaint in this Court: that Agustin has not raised nor presented **his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA** before the district court, and

that he has no such claim pending before the district, or in any other court, at the time of filing of the instant Complaint. See Keene Corp. v. United States, 508 U.S. 200, 208, 207 (1993).

At the time of filing of the instant Complaint in this Court, based on the district court's May 23, 2001 Order, at [App. E-30], Agustin has no claim "pending" in the district court, nor in any other court, "for or in respect" to "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA". See 28 USC Section 1500 and [App. E-30]. Here, with respect to District Court's Judgments over Agustin's claim for violation of his rights under Section 501 of the Rehabilitation Act and the Civil Rights Act, 28 USC Section 1500 and res judicata do not apply over his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA before this honorable Court because "the nature of the claim and the desired relief were precisely [not] the same in the two actions". See Angel v. Bullington, 330 U.S. 183, 186 (1947).

In Agustin's June 6, 2000, original Complaint, he timely raised and presented his claim that: "With its [April 12, 1995] disciplinary removal decision, the Navy, with impunity, ***unlawfully and/or unconstitutionally*** obliterated **his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA**". June 6, 2000 Complaint, at page 13, (bold and underline added). With respect to this claim--Agustin's **claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA**, to obtain relief, Agustin needs only to demonstrate that: the Navy's April 12, 1995 action violated his substantive, statutory rights pursuant to the said statutes; that the said statutes are money-mandating in nature, are "applicable law[s]" within the meaning of the Back Pay Act,

and were applicable to Agustin at the time of the Navy's April 12, 1995 action or at the time of his April 21, 1995 discharge; and that such violation was not covered under the CSRA. (Compare defendant's futile and meritless arguments at page 6 of defendant's 10-1-01 opposition/filing). Here, Agustin has very clearly demonstrated and defendant has not disputed that: **the Navy's 4-12-95 action violated a federal statute--the clear statutory mandate of 65 Statute 681, Section 204 or 5 USC Section 6307**. The Navy's April 12, 1995 action has violated Agustin's "clearly established statutory or constitutional rights"--his substantive, statutory right "to sick leave with pay" (65 Statute 681, Section 204 or 5 USC Section 6307) and his substantive, constitutional rights to protection from the unconstitutional taking of his constitutionally-protected rights, property, or interests without just compensation; to medical care or treatment; and to equal protection of the laws. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Agustin also presents and submits that in interpreting the application of 28 USC Section 1500 involving two claims in two separate federal courts, when one federal court, (in this case--the District Court), has very clearly and very explicitly, fully litigated the jurisdiction issue, that the same plaintiff "failed to allege" or did not raise nor present a specific claim, (in this case--Agustin's claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA) before such court, the comparison of what were the relevant operative facts in each one of the two claims has become moot, and such federal court's jurisdiction ruling is the end of the matter with respect to the issue of jurisdiction, and res judicata applies over the "time-of-filing rule" jurisdiction claim or issue with respect to such claim. Keene, id., at 208.

Here, it is quite important to note the very quite unique and very quite relevant fact that the District Court was fully aware of Agustin's June 6, 2000 claim before this Court that "the Navy, with impunity, ***unlawfully and/or unconstitutionally*** obliterated **his constitutionally protected, statutory rights under 5 USC Section 6307 and/or under FECA**" (June 6, 2000 Complaint, at page 13, (bold and underline added)), and that the issue of jurisdiction as to: whether such claim was pending before the district court at the time of filing of the instant Complaint in this Court, was fully litigated and adjudicated by the District Court in its May 23, 2001 jurisdiction ruling (at [App. E-30]. See Agustin's June 6, 2000 Complaint's CERTIFICATE OF SERVICE before this Court, which shows that on May 18, 2000, he also had served the District Court with a copy of such Complaint.

In the instant case, the District Court's May 23, 2001 jurisdiction ruling ([App. E-30]) over Agustin's claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA that he has no such claim pending before the district court operates as *res judicata* to any attempt by the defendant to relitigate the same jurisdiction claim or issue before this honorable Court.

Furthermore, Agustin's claim before the District Court for violation of his rights under Section 501 of the Rehabilitation Act and the Civil Rights Act and his claim before this honorable Court for violation of "his rights under 5 USC Section 6307 and/or FECA" ([App. E-30]) are not the same claim, are distinctly different claim, and the desired relief are distinctly different in the two actions. The desired relief Agustin was seeking in the District Court is distinctly different: front pay and compensatory damages based on his claim for violation of his rights pursuant to Section 501 of

the Rehabilitation Act (or 29 USC Section 791) and the Civil Rights Act. See the distinctly different relief provided by 29 USC Section 794a(a)(1) for violation of 29 USC Section 791. This Court has no jurisdiction over such claims, no jurisdiction to grant such "distinctly different" relief, and Agustin could not, and does not, seek such "distinctly different" relief from this Court. Keene, id., at 216. "That suit [the Rehabilitation Act and the Civil Rights Act suit] and the [Rehabilitation Act and the Civil Rights Act provisions]...necessarily prevent [Agustin] from suing on those claims in the Court of Claims, and exclude its jurisdiction of them". See In Re Skinner & Eddy Corporation, 265 U.S. 86, 95 (1924).

REPLY TO DEFENDANT'S OPERATIVE FACTS-ARGUMENT

The plain and unambiguous, clear statutory mandate of 65 Statute 681, Section 204, the Statute from which 5 USC Section 6307 was codified, states that:

"(a) Officers and employees to whom this title applies **shall be entitled to sick leave with pay**...(b) The sick leave provided for in this section, which is not used by an officer or employee during the year in which it accrues, **shall accumulate and be available for use** in succeeding years." 65 Statute 681, Section 204, (bold and underline added).

5 USC Section 6307, in identical, pertinent, plain and unambiguous, clear statutory mandate and language, states that:

"(a) An employee **is entitled to sick leave with pay**...(b) Sick leave provided by this section, which is not

used by an employee, **accumulates for use** in succeeding years." 5 USC Section 6307, (bold and underline added).

The sick leave statute's implementing federal regulations, 5 CFR Section 630.401(a), very clearly and very explicitly commands that:

"[A]n agency **must grant sick leave** to an employee when the employee--(1) Receives medical, dental, or optical examination or treatment; (2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth". 5 CFR Section 630.401(a)(1), (2), (bold and underline added).

Even assuming arguendo, just for the sake of argument, that res judicata does not apply over defendant's 28 USC Section 1500 jurisdiction claim or issue, even in light of the indisputable fact that the District Court's May 23, 2001 jurisdiction ruling (at [App. E-30]) has very clearly and very explicitly announced and declared that the District "Court has reviewed plaintiff's Complaint and fails to find any such allegations contained within", that Agustin "failed to allege" or did not raise nor present "his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA" before the District Court, and that the District Court "cannot adjudicate" such claim, the key and threshold, relevant and material, undisputed and indisputable, operative facts for or in respect to Agustin's "claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA", are: (1) that Agustin's 2-16-95 application to use "sick leave due to occupational injury" "from 1-23[-95] to until further notice" (exhibit 62) was approved by the Navy on 2-28-95 (see exhibit 6, and Note 4 below); (2) that on 4-21-95 he has unused and remaining, 700.9 hours of accumulated sick leave (the 252.9 hours accumulated sick leave he has

remaining on 4-21-95 plus the 448 sick leave hours for the period from 2-2-95 to 4-21-95, which should be charged to FECA compensation and which he lost due the deprivation of his statutory rights to use, or to take sick leave; 252.9 + 448 = 700.9), and 444.8 hours of accumulated annual leave; (3) that at the time of Agustin's discharge on 4-21-95, as a Navy civilian federal employee, like all similarly situated federal employees, he has the same fair and equal, substantive, statutory right "to sick leave with pay" pursuant to the clear statutory mandate of 65 Statute 681, Section 204; (4) (the most relevant operative fact) that **the Navy's April 12, 1995 action against Agustin, which became effective on April 21, 1995, has violated a federal statute--that the Navy's April 12, 1995 action violated the clear statutory mandate of 65 Statute 681, Section 204--and has violated our U.S. Constitution's Equal Protection guarantee under the equal protection component of our U.S. Constitution's Fifth Amendment**; (5) that 65 Statute 681, Section 204 is money-mandating in nature and is an "applicable law" within the meaning of the Back Pay Act; (6) and that Agustin's claim for violation of 65 Statute 681, Section 204 or 5 USC Section 6307 was not covered under the CSRA.

(Note 4: Exhibit 6 [or App. E-6]--the Navy's 2-28-95 approval memorandum of Agustin's sick leave request--stated that: "[Y]our request for sick leave ["from 1-23[-95] to until further notice" (exhibit 62 [or App. E-62])] is approved. A copy of your Application for Leave [plaintiff's exhibit 62] is provided herewith as enclosure (1). You are reminded that if your sick leave account becomes exhausted your absence will automatically be charged to annual leave and if that account becomes exhausted your absence will be charged to leave without pay." Plaintiff's exhibit 6).

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In cases involving the deprivation, violation, or "destruction of" "property right[s]" or "interests" such as in Agustin's case, "operative facts" means "'operative facts determining legal rights, duties, and liabilities'". See United States v. Security Industrial Bank, 459 U.S. 70, 75, 80, 81 (1982) (citation omitted).

REPLY TO DEFENDANT'S NINTH CIRCUIT APPEAL ARGUMENT

Concerning defendant's argument with respect to Agustin's filing of an appeal with the Ninth Circuit U.S. Court of Appeals concerning the district court's Judgments over Agustin's claim for violation of his rights under Section 501 of the Rehabilitation Act and the Civil Rights Act, (see pages 4-5 of defendant's 10-1-01 opposition/filing; pages 2-3 of defendant's 9-14-01 response; and page 5 of defendant's 8-30-01 opposition/filing), such argument is also futile and totally and completely without merit. Such filing has no bearing and is not relevant in the instant case because such filing did not change "the state of things at the time of" filing of the instant Complaint in this Court. See Keene, id., at 207. Furthermore, such appeal is not over the same claim, is not "for or in respect" to his claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA, and it does not constitute the same claim within the meaning of 28 USC Section 1500. Agustin's Rehabilitation Act or Civil Rights Act-statutory right-violation claim before the District Court and his sick leave-statutory right-violation claim before this honorable Court are not the same claim because "the nature of the claim and the desired relief" are distinctly different in the two actions. See Angel v. Bullington, 330 U.S. 183, 186 (1947).

REPLY TO DEFENDANT'S LEGAL THEORY ARGUMENT

Concerning defendant's legal theory-argument, (at pages 6-7 of defendant's 10-1-01 opposition/filing; and at pages 3-4 of defendant's 9-14-01 response), defendant's argument is futile and totally and completely without merit because Agustin's claim that the Navy violated his rights under 5 USC Section 6307 is not a legal theory but: a timely-filed, judicially cognizable claim before this Court, which is based on "applicable law", which is money-mandating in nature within the meaning of the Back Pay Act, and which was applicable to Agustin at the time of the Navy's April 12, 1995 action or at the time of his April 21, 1995 discharge; such claim for violation of 5 USC Section 6307 was not covered under the Civil Service Reform Act (CSRA); and no such claim was pending in the district court, or in any other court, for or in respect to such claim, at the time of filing of such claim in this Court.

There is "no law, rule, or regulation that gives the Board [the Merit Systems Protection Board (MSPB)] jurisdiction over [Agustin's] claim for violation of [65 Statute 681, Section 204 or 5 USC Section 6307]". See Worthington v. U.S., 168 F3d 24, 27 (Fed. Cir. 1999) (underline added).

Here, before this honorable Court, Agustin has a constitutional, Due Process right, based on his claim that the Navy's April 12, 1995 action violated a federal statute--the clear statutory mandate of 65 Statute 681, Section 204 or 5 USC Section 6307, and based on the Back Pay Act and the Tucker Act, **to have his day in court before this honorable Court for or in respect to his timely-filed, judicially cognizable "claim that the Navy violated his rights under**

5 USC Section 6307 and/or FECA", which the district court very clearly and very explicitly ruled in plain English that it "cannot adjudicate" "because plaintiff failed to allege" or because Agustin did not raise or present such claim in that court. [App. E-30]. "It is well established that a party may challenge a **violation of federal statute** in federal court if it has suffered 'injury that fairly can be traced to the challenged action of the defendant,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976), and that is 'likely to be redressed by the requested relief.' *Allen v. Wright*, supra, at [468 U.S. 737,] 751." Primate Protection League v. Tulane Ed. Fund, 500 U.S. 72, 77 (1991), (bold and underline added). "As the Supreme Court noted, when there is a legal right without a legal remedy, the right has little meaning." N.A.A.C.P. v. Medical Ctr. Inc., 599 F.2d 1247, 1254-5 (3rd Cir.1979).

REPLY TO DEFENDANT'S FECA ARGUMENT

Concerning defendant's FECA argument, (at page 5-6 of defendant's 9-14-01 response), it is wrong, wide off the mark, is futile, and is totally and completely without merit. Defendant is mixing apples and oranges--the action of the Secretary of Labor and the action of the Navy. Agustin's claim against the Navy's 4-12-95 action, which deprived his right to use, or to take, sick leave pursuant to 5 USC Section 8118(c), or which deprived his substantive, statutory right "to sick leave with pay" pursuant to 65 Statute 681, Section 204, is not about the Secretary of Labor's "award for or against payment of [FECA] compensation" nor is it an "action of the Secretary" "allowing or denying a [FECA] payment" under FECA benefits administration which is covered by 5 USC Section 8128. It is about the action of the Navy, which deprived his rights to use, or to take, sick leave with pay pursuant to 5 USC Section 8118(c) and/or 65

Statute 681, Section 204. Granting or denying a sick leave application by a federal employee is an action of the federal employing agency, not an action of the Secretary of Labor under the FECA benefits adjudication process. See exhibits 62 and 6.

5 USC Section 8118(c) states that: "An employee may use annual or sick leave to his credit at the time the disability begins...".

5 USC Section 8118(c) is money-mandating in nature; is an "applicable law" within the meaning of the Back Pay Act; it granted disabled federal employees a substantive, statutory right to "use...sick leave" in case of work-related disability; and its violation in the instant case, by the Navy's April 12, 1995 action, was not covered under the CSRA.

Such statutory right to use sick leave is entirely consistent with FECA's overall statutory scheme to avoid interruption of income to injured employees while their FECA compensation claims are being adjudicated: to either be on FECA continuation of pay, or annual or sick leave. "[FECA] Compensation may not be paid while an injured employee is in [FECA] continuation of pay status or receives pay for leave." 20 CFR Section 10.401. Also see 5 USC Section 8118(d). Here, it is undisputed and indisputable by the defendant that Agustin's "disability begins" at the time of his on-the-job injury on 12-14-93; that he was on FECA continuation of pay from 12-15-93 to 1-31-94, on FECA compensation from 2-1-94 to 1-22-95, and on approved sick leave from 1-23-95 to 4-21-95; that he has 700.9 hours of accumulated sick leave and 444.8 hours of accumulated annual (and restored annual) leave "to his credit" (5 USC Section 8118(c)) at the time of his discharge on April 21,

1995; and that the sick leave-statutory right-violation at issue here is the 4-12-95 action of the Navy (plaintiff's exhibits 7-8)--the deprivation of Agustin's substantive, statutory rights to sick leave with pay for the period from after April 21, 1995 to until the exhaustion of his sick leave and annual leave accounts. Also see exhibits 60-61, 34, 38, 62, and 6.

There is no law, case law, rule, or regulation, which provides judicial review shield to the 4-12-95 action of the Navy against Agustin (plaintiff's exhibits 7-8), which deprived or violated his substantive statutory rights to use, or to take, sick leave with pay pursuant to 5 USC Section 8118(c) and/or 65 Statute 681, Section 204.

REPLY TO DEFENDANT'S RELITIGATION ARGUMENT

Concerning defendant's meritless, relitigation-argument, (at page 6 of defendant's 10-1-01 opposition/filing; and at page 6 of defendant's 8-30-01 opposition/filing), how could this honorable Court relitigate Agustin's claim that the Navy violated his rights under 5 USC Section 6307 and/or FECA, when such claim has not been litigated or "adjudicate[d]" yet in any other court? See [App. E-30].

REPLY TO DEFENDANT'S LUMP SUMP-SICK LEAVE ARGUMENT

Concerning defendant's lump sump payment of accrued sick leave-argument, (at page 7 of defendant's 8-30-01 opposition/filing), based and as applied on the key and threshold, most relevant and material, operative fact in the instant case--the Navy's violation of a federal statute, the clear statutory mandate of 65 Statute 681, Section 204—the

key and threshold inquiry is: whether Agustin has substantive, statutory right or entitlement "to sick leave with pay" at the time of his discharge on April 21, 1995 pursuant to 65 Statute 681, Section 204(a), which the Navy has deprived or violated; not whether discharged federal employees are "entitled to a lump sump payment based on [their] accrued sick leave". Compare Everett v. United States, 340 F.2d 352, 357 (1965).

Agustin presents and submits that the Navy's April 12, 1995, "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)) has violated a federal statute--the clear statutory mandate of 65 Statute 681, Section 204--which deprived or violated Agustin's constitutionally protected interests: his substantive, statutory right or benefit to "sick leave with pay" (65 Statute 681, Section 204(a)), and that **such clear statutory mandate-violative action, also violated his constitutional right to equal protection of the laws under the equal protection component of our U.S. Constitution's Fifth Amendment**. Agustin, like all similarly situated federal employees, has the same fair and equal, substantive, statutory right to "use", or to take, "sick leave with pay" due to incapacitating illness or injury pursuant to the clear statutory mandate of 65 Statute 681, Section 204. "It [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests". Perry v. Sindermann, 408 U.S. 593, 597 (1972). Here, defendant has conceded to Agustin's timely-filed and judicially cognizable, Equal Protection-constitutional violation claim by not responding to such claim throughout this Court's proceedings.

As Agustin has repeatedly raised and presented, **the Navy's April 12, 1995, "unjustified or unwarranted personnel action" (5 USC Section 5596(b)(1)) against**

Agustin was void ab initio, unlawful, and/or unconstitutional because the said action deprived or violated Agustin's "clearly established statutory or constitutional rights" (Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (bold and underline added))--his substantive, statutory right "to sick leave with pay" (65 Statute 681, Section 204(a)) or "the right to take sick leave" (Hambsch v. U.S., 490 U.S. 1054, 1058 (1989) (Justice O'CONNOR, with whom Justice SCALIA and Justice KENNEDY join, dissenting) and his substantive, constitutional rights to protection from the unconstitutional taking of his property, rights, or interests without just compensation; to medical care or treatment; and to equal protection of the laws.

No action by the federal government against any individual, (including "personnel actions and pay actions (alone or in combination)" (5 CFR Section 550.803)), such as **the Navy's April 12, 1995 action against Agustin, which violated a federal statute--the clear statutory mandate of 65 Statute 681, Section 204**--could stand as lawful and/or constitutional, if such action has violated any one of our federal statutes or any one of our U.S. Constitution's provisions.

CONCLUSION

Based on all the foregoing, Agustin's 8-30-01 motion for leave to amend the instant Complaint to include his tax refund claims for tax years 1996 and 1997 (or Claim 5) should be granted; and based on all his filings, all his eight (8) claims should be decided in his favor.

Respectfully submitted, through, and with help and assistance from friends,

/s/ REMIGIO I. AGUSTIN
REMIGIO I. AGUSTIN